Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

# APPENDIX

## In the Supreme Court of the United States

OCTOBER TERM, 1975

**No. 74-6212**

GREGORY B. NORTON, JR., ET AL.,
*Appellants,*

—v.—

F. DAVID MATHEWS,
Secretary of Health, Education and Welfare,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FILED MARCH 19, 1975
JURISDICTION POSTPONED JUNE 30, 1975

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## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 6, 1971—Social Security Administration Hearing Examiner's Decision rendered.

January 19, 1972—Action of Appeals Council on Request for Review filed.

March 17, 1972—Plaintiffs' Complaint filed.

March 17, 1972—Plaintiffs' Application for Convening of Three-Judge Court filed.

June 19, 1972—Plaintiffs' Motion for Certification as a Class Action filed.

June 21, 1972—Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment filed.

July 3, 1972—Plaintiffs' Motion for Preliminary Injunction and Summary Judgment filed.

December 22, 1972—Memorandum Opinion of District Court (single judge) filed.

December 22, 1972—Judgment of District Court (single judge) entering summary judgment for defendant on non-constitutional issue filed.

December 22, 1972—Notification and Request for Designation of Three-Judge Court filed.

December 29, 1972—Designation of Three-Judge Court filed.

March 23, 1973—Hearing held on all pending motions before three-judge court.

September 14, 1973—Opinion of District Court (three judges) filed.

September 27, 1973—Order of District Court (three judges) granting motion of defendant for summary judgment and denying motion of plaintiff for summary judgment filed.

October 5, 1973—Notice of Appeal of Plaintiffs to the Supreme Court filed.

July 24, 1974—Attested copy of Order of the Supreme Court vacating the judgment of the district court and remanding for further consideration filed.

September 20, 1974—Hearing held before District Court (three judges) regarding remand from Supreme Court.

February 28, 1975—Majority Opinion of District Court (three judges) and Dissenting Opinion filed.

February 28, 1975—Order of District Court (three judges) filed, denying plaintiffs' motion for summary judgment, granting defendant's motion for summary judgment, dismissing case, and entering judgment in favor of defendant.

March 17, 1975—Notice of Appeal of Plaintiffs to the Supreme Court filed.

June 30, 1975—Orders of Supreme Court filed granting motion for leave to proceed *in forma pauperis* and postponing further consideration of the question of jurisdiction.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, MARIAN B. CHILES, 308 East Lorraine Avenue, Baltimore, Maryland 21218, Individually and on behalf of all others similarly situated, PLAINTIFFS

*vs.*

ELLIOT RICHARDSON, Secretary, Department of Health, Education and Welfare, 330 Independence Avenue, S.W., Washington, D. C. 20201, Serve by certified mail pursuant to 28 U.S.C. § 1391(e), Individually and in his official capacity, DEFENDANT

COMPLAINT

For Declaratory and Injunctive Relief
and Relief in the Nature of Mandamus

I.

*Introduction*

In this complaint plaintiff, an illegitimate minor child suing by his next of friend and on behalf of a class of all similarly situated persons, seeks an order from this court adjudging Section 216(h)(3)(A)(ii) of the Social Security Act, 42 U.S.C. § 416(h)(3)(A)(ii), to be invalid in that it arbitrarily discriminates against illegitimate children. Alternatively, plaintiff contends that he has nevertheless met the statutory criteria of his section and should be deemed eligible for child's insurance benefits under the Act.

The challenged statutory provision governs the dispersal of federal Social Security survivors insurance benefits. It provides that certain illegitimate children must, in addition to establishing their fathers' paternity, prove that their fathers contributed to their support or lived

with them, matter not required by he Act to be met by legitimate children. Because plainiff failed to establish to the administrative tribual's satisfaction that he was supported by his father, he was ruled ineligible for child's insurance benefits.

In addition to his statutory argument, plaintiff and his class contend that this discriminatory provision denies them due process of law and equal protection of the laws, as guaranteed by the Fifth Amendment to the United States Constitution. They ask for declaratory and injunctive relief and the issuance of an order in the nature of mandamus against defendant, the Secretary of Health, Education, and Welfare, requiring payment of all monies due.

II.

*Jurisdiction*

Jurisdiction is conferred on this court by any of several independent federal statutory bases:

1. Jurisdiction is conferred on this court by 28 U.S.C. § 1361 which grants this court original jurisdiction in any action in the nature of mandamus to compel an officer of the United States or agency thereof to perform a duty owed to the plaintiff.

2. Jurisdiction is alternatively conferred on this court by 28 U.S.C. § 1331 which grants this court original jurisdiction in a civil action raising a federal question wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

3. Jurisdiction is alternatively conferred on this court by Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), which grants this court original jurisdiction to review a final administrative decision by the Department of Health, Education, and Welfare denying certain benefits under the Social Security Act.

4. Jurisdiction is alternatively conferred on this court by Section 10(a) of the Administrative Procedure Act, 5 U.S.C. §§ 701-4, which creates jurisdiction in this court to review the final adverse action of the federal agency involved in this complaint.



III.

*Three-Judge Court*

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284 since plaintiff seeks an injunction to restrain defendant, a federal officer, from the enforcement, operation, and execution of an Act of Congress on the ground that it is contrary to the Constitution of the United States.

IV.

*Plaintiff*

The named plaintiff, Gregory B. Norton, Jr., suing by his next of friend and grandmother, Marian B. Chiles, resides with Mrs. Chiles at 308 East Lorraine Avenue, Baltimore, Maryland. Gregory Norton is presently eight (8) years of age, having been born on February 10, 1964. He and his guardian are residents of Maryland and citizens of the United States.

V.

*Defendant*

Defendant, Elliot Richardson, is the Secretary of the Department of Health, Education, and Welfare of the United States Government. He is charged under the Social Security Act with the primary responsibility for the administration of the Social Security Administration and the execution of its laws, including 42 U.S.C. § 416(h)(3) which is challenged herein as being in conflict with the Constitution of the United States.

VI.

*Class Action*

The named plaintiff brings this action on his own behalf and, pursuant to Fed. R. Civ. P. 23(a) and (b)(2), on behalf of all other persons similarly situated. Plain-

tiffs' class is composed of all persons otherwise eligible for Social Security child's insurance benefits but for that fact that they are illegitimate by birth and are unable to meet the eligibility requirements of 42 U.S.C. § 416 (h) (3) (A) (ii) relating to support and residence. This class is so numerous that joinder of all members is impossible and impracticable. There are questions of law and fact common to the class. The named plaintiffs will fairly and adequately protect the interests of the class. The defendant and his agents have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

## VII.

### *Factual Allegations*

1. Gregory B. Norton, Sr., the natural father of plaintiff Gregory B. Norton, Jr., was born March 9, 1947.

2. Mr. Norton entered the United States Army on February 28, 1965.

3. On May 19, 1966, Mr. Norton, at age nineteen (19), was killed while on duty in Vietnam as a result of a metallic fragment wound in his head that was incurred when a hostile booby trap detonated during military operations.

4. Mr. Norton's earnings while in the military service were sufficient to entitle him to Social Security benefit coverage under Title II of the Social Security Act.

5. Gregory B. Norton, Jr., the plaintiff, was born at Johns Hopkins Hospital in Baltimore, Maryland on February 10, 1964 to Laurie Marie Brown, then aged fourteen (14), and Gregory B. Norton, Sr., then aged sixteen (16).

6. Gregory's parents were never married.

7. Since his birth, Gregory has been in the care of Mrs. Marian B. Chiles, Laurie Marie Brown's mother, who presently resides at 308 East Lorraine Avenue, Baltimore, Maryland.



8. Gregory, Jr., is his father's only natural child. Mr. Norton was never married.

9. Gregory Norton, Sr., orally admitted to being his son's father.

10. Prior to going into the Army, Mr. Norton was an unemployed secondary school student who lived with his parents. He accordingly was unable to contribute a significant amount of money to his son's support. He did contribute a small amount of money, baby clothes, and other infant equipment.

11. Mr. Norton did work briefly at a bowling alley in 1964.

12. After Mr. Norton went into the service he wrote home for Gregory's birth certificate and other items needed for him to make out an allotment and insurance for the child. The birth certificate was found in his personal effects after his death. An allotment or insurance for the child was never made out.

13. Plaintiff's grandmother, Mrs. Marian Chiles, on September 2, 1969 filed an application on Gregory's behalf for child's insurance benefits based on the earnings of his deceased father. If granted, Gregory would have been enttiled to a monthly benefit amount of $44.00.

14. This application was denied because the claimants had failed to prove that Mr. Norton had been living with or contributing to the support of his son, a requirement for benefits set forth by Section 216(h)(3)(A)(ii) of the Act.

15. Upon Mrs. Chiles' request for reconsideration, this original determination of ineligibility was affirmed on May 14, 1970.

16. Mrs. Chiles next requested a formal hearing on her application for child's insurance benefits for Gregory. The Social Security Administration hearing examiner held in his opinion of August 6, 1971 that Gregory B. Norton, Sr., was indeed the father of Gregory, Jr., but that there was:

> insufficient evidence that [he] . . . "supported" Gregory B. Norton, Jr. and the evidence indicates that the wage earner did not, while in the service, ob-

> tain an allotment of soldier's pay for the purpose of supporting the child . . . .

Because the hearing examiner also found that Mr. Norton had not lived with his son at the time of his death, he ruled that the requirements of Section 216(h)(3)(A)(ii) had not been met and that Gregory was therefore not entitled to child's insurance benefits. (See Exhibit A, attached.)

17. Mrs. Chiles' request for a review of this decision was denied on January 19, 1972 by the Appeals Council of the Social Security Administration. (See Exhibit B, attached.)

18. If able to establish eligibility for child's insurance benefits, Gregory Norton, Jr., would now be receiving a monthly sum of $70.40, the present minimum benefit amount.

19. Gregory Norton, Jr., has been determined eligible for and is now receiving Veterans Administration benefits.

20. Gregory Norton, Jr., has at no time received any Social Security child's insurance benefits.

21. Because of defendant's refusal to grant him benefits, Gregory Norton, Jr., is presently suffering irreparable harm. His damage exceeds $10,000, in sum or value, exclusive of interest.

VIII.

*First Cause of Action*

1. The Social Security Act sets forth four ways in which illegitimate children can qualify to receive their deceased parent's survivors insurance benefits. First, such child is eligible if under the intestate succession law of the state in which the child is domiciled, the child could inherit the deceased's personal property, 42 U.S.C. § 416(h)(2)(A). Second, the child is eligible if his or her parents "went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment . . . would have been a valid marriage." 42 U.S.C. § 416(h)(2)(B). Third, an illegitimate child can qualify if the child's paternity were established by a



written acknowledgment, court decree, or court support order. 42 U.S.C. § 416(h)(3)(A)(i).

2. Not being able to meet any of these tests, plaintiff sought to qualify under the fourth, 42 U.S.C. § 416(h)(3)(A)(ii), which requires establishing "by evidence satisfactory to the Secretary" that the deceased wage earner was:

> the father of the applicant and was living with or contributing to the support of the applicant at the time such insured individual became entitled to benefits or attained age 65, whichever first occurred; . . .

3. Plaintiff contends that the proper application of this statutory requirement to the facts of his case requires a finding that he has met the Act's requirements and is eligible for child's insurance benefits.

4. The Social Security Administration was accordingly in error in holding that there is insufficient evidence to establish plaintiff's eligibility under the terms of § 416(h)(3)(A)(ii).

IX.

*Second Cause of Action*

1. The provisions of 42 U.S.C. § 416(h)(3)(A)(ii) impose an extra condition of eligibility upon plaintiff's class of illegitimate children that is not required of other children under the Act.

2. This subsection therefore creates two classes of insured wage earners' children: (1) those illegitimate children who can qualify for benefits in no other way than to rely on section 416(h)(3)(A)(ii) and who are unable to meet the "living with" or "contributing to" criteria and (2) those children, both legitimate and illegitimate, who are not required to prove that their father lived with them or supported them and are thereby able to receive child's insurance benefits.

3. No adequate governmental justification exists for this arbitrary scheme which discriminates against certain illegitimate children. It accordingly is invalid as a denial of equal protection of the laws as guaranteed by the Fifth Amendment of the United States Constitution.

## X.

*Third Cause of Action*

1. By denying child's insurance benefits to plaintiff and his class, Section 216(h)(3)(A)(ii) of the Social Security Act deprives them of valuable rights due to actions of their parents over which these children have no control.

2. This arbitrary and capricious denial of benefits constitutes a denial of due process and accordingly is unconstitutional under the Due Process Clause of the Fifth Amendment of the United States Constitution.

## XI.

*Prayer for Relief*

WHEREFORE, plaintiff respectfully prays, on behalf of himself and all others similarly situated that this Honorable Court:

1. Convene a three-judge court to hear this case pursuant to 28 U.S.C. §§ 2282 and 2284.

2. Certify this action as a class action pursuant to Fed. R. Civ. P. 23(c)(1).

3. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202, declaring Section 216(h)(3)(A)(ii) of the Social Security Act invalid, insofar as it discriminates against illegitimate children, on the ground that it is violative of the Fifth Amendment to the United States Constitution.

4. Enter preliminary and permanent injunctions pursuant to Fed. R. Civ. P. 65 and a writ in the nature of mandamus enjoining defendant, his successors in office, agents, employees, and all other persons in active concert and participation with them from refusing to grant plaintiff and his class child's insurance benefits merely because they are illegitimate and unable to establish that their father lived with or supported them.

5. Order defendant, his successors in office, agents, and employees to notify promptly by first class mail at their last known address all persons who have been denied



child's insurance benefits due to Section 216(h)(3)(A)(ii) that they are now eligible for such benefits and may reapply.

6. Grant plaintiffs and all those similarly situated such additional or alternative relief, including payment of all monies wrongfully withheld, as may seem to this court to be just and proper.

Respectfully submitted,

/s/ C. Christopher Brown
C. CHRISTOPHER BROWN
Law Reform Unit
Legal Aid Bureau, Inc.
341 North Calvert Street
Baltimore, Maryland 21202
Telephone: 685-1112

/s/ Michael Berman
MICHAEL BERMAN
Legal Aid Bureau, Inc.
341 North Calvert Street
Baltimore, Maryland 21202
Telephone: 539-5340
Attorneys for Plaintiffs

STATE OF MARYLAND, ss:

Marian B. Chiles, being duly sworn, does depose and say that she is the next of friend of the named plaintiff herein, that she has read the foregoing complaint and knows the contents thereof, and that they are true to the best of her knowledge and belief.

/s/ Marian B. Chiles
MARIAN B. CHILES

Subscribed and Sworn to before me this 15th day of March, 1972.

/s/ William L. Fuller
Notary Public

My Commission Expires: July 1, 1974

EXHIBIT A

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

## NOTICE OF DECISION

*PLEASE READ CAREFULLY*

If you disagree, in whole or in part, with the enclosed decision of the hearing examiner, you may request the Appeals Council to review it. However, your request for review must be filed *within 60 days* following the date shown below.

You, or your representative, may file the request for review at the nearest office of the Social Security Administration, or you may file the request for review with the hearing examiner, or with the Appeals Council.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under sections 205(g) and 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing examiner's decision mailed to the claimant and representative Michael Berman, Esq., 341 N. Calvert Street, Baltimore, Maryland 21202 on August 6, 1971.



DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

## HEARING EXAMINER'S DECISION

In the case of

Marion B. Chiles, Guardian
on behalf of Gregory B. Norton, Jr.
(Claimant)

Gregory B. Norton
(Wage Earner) (Leave blank if same as above)

Claim for

(Child's Insurance Benefits)
Retirement Insurance Benefits

212-48-8660
(Social Security Number)

This case is before the undersigned Hearing Examiner upon request for hearing filed by Marion B. Chiles, guardian of Gregory B. Norton, Jr. The claimant is dissatisfied with the determination made by the Bureau of Retirement and Survivors Insurance, Social Security Administration, Department of Health, Education and Welfare, disallowing Marion B. Chiles' application for Child's Insurance Benefits for Gregory B. Norton, Jr. After appropriate notice, a hearing was held before the undersigned Hearing Examiner on June 7, 1971, at Baltimore, Maryland, with the claimant present and participating. Claimant was represented by Michael Berman, Esq. Also present and participating was Edward D. Green, a contact representative for the Veterans Administration.

The claimant filed an application for Child's Insurance Benefits on behalf of Gregory B. Norton, Jr. on September 2, 1969. She was notified by letter dated October 22, 1969 that the requirement of the Social Security Act

that the father must have acknowledged in writing or have been ordered by court to contribute to the childs support or have been judicially declared to be the child's father and as living with the child or contributing to his support, had not been met. Claimant requested reconsideration by the Social Security Administration and was thereafter notified by letter dated May 14, 1970 that the original determination on her application for Child's Insurance Benefits was affirmed. The request for hearing was filed on November 12, 1970.

*Procedural Matters*

An objection to the admission of Exhibit 17 was made but that objection was overruled because Mrs. Chiles was present to testify to correct any errors which might appear in that statement. There was an objection to Exhibit 16 and the objection was granted and exhibit is hereby removed because it amounts to an administrative summary of the processing of this case. An objection was raised to Exhibit 11 but it was also overruled because of the presence at the hearing of Mr. Green, the Veterans Administration contact representative.

*Statement of Issues and Applicable Law*

The general issue before the Hearing Examiner is whether or not Gregory B. Norton, Jr. is entitled to surviving Child's Insurance Benefits on the earnings of the deceased wage earner and whether the deceased wage earner was the biological father of this child and that the child was living with or being supported by the father at the time of the father's death. Section 216(h)(3) of the Act, as here pertinent, provides that an illegitimate child under certain conditions meets the definition of "child" even though he neither has any inheritance rights from the wage earner under the state laws nor is deemed to be wage earner's child by virtue of an invalid ceremonial marriage.

Section 216(h)(3)(C) of the Social Security Act provides, as is pertinent here, that the applicant shall be



determined to be the child of that individual if such insured individual is shown by evidence satisfactory to the Social Security Act to have been the father of the applicant and such insured individual also was living with or contributing to the support of the applicant at the time of such wage earner's death.

*Summary of the Evidence*

Gregory B. Norton was born March 9, 1947. He went into the military service February 28, 1965 and died in Viet Nam on May 19, 1966. Gregory B. Norton, Jr. was born February 10, 1964 in Baltimore City at the Johns Hopkins Hospital to Laurie Marie Brown (age 14) and Gregory Bernard Norton (age 16). The original birth certificate showed the name of the father of the child to be Gregory B. Brown, but the name Brown was later stricken out and the name Norton placed thereon. (Exhibit 13)

The child Gregory B. Norton, Jr. has been in the care of Marion B. Chiles, the mother of Laurie Brown, since birth. Mrs. Chiles testified how before the birth of the child, the father of the child, Gregory B. Norton, who was unemployed and lived with his parents, admitted being the father of the child which was to be born to Laurie Brown. She indicated that no support was given the first year but gifts of clothes and baby bottles, etc. were given at the time of the birth. At the time of the birth, Gregory was a student, age 16 and the mother of the child was only 14. Mrs. Chiles testified that after Gregory B. Norton went into the army he wrote home for the birth certificate of the child and other things he needed so that he could make out an allotment and insurance for the child.

Edward D. Green, a Contact Representative of the Veterans Administration, read into the record a number of depositions which the Veterans Administration had previously taken. Essentially and briefly, the deposition of Laurie Brown Edwards, the mother of the child, indicated that at one time, claimant gave her $6 and some clothes.

He visited her at the hospital. She indicated that she went to the State's Attorney's office in the Court House about support for the child. They told her that when Gregory B. Norton was home from the service, he should come down for an interview. When Gregory B. Norton came home, he never went down for the interview. As to support of the child, she indicated Gregory B. Norton did not make an allotment although he asked for the birth certificate and it was sent to him but nothing came of it. Mr. James Robertson was previously married to Marion B. Chiles. He indicated Gregory Norton admitted being the father of the child and that Gregory brought clothes, bottles, nipples, etc. Mrs. Maith, the mother of Gregory B. Norton, said that he lived with her before he went into the service and that the mother of the child had not asked for help and that there was no contact until after the death of her son. She did say that her son said, "I am going to make out an allotment for the baby." The birth certificate was found in her son's personal affects. Mrs. Maith was the full beneficiary of the insurance policy. The deposition of Mrs. Mary Evans was also read and it indicated that she tried to find the address of Gregory, Jr. and the mother of the child so that she could contact them on behalf of Gregory B. Norton so that he would have something to show to the military that the child was his son.

An application for compensation for pension for Gregory B. Norton, Jr. from the Veterans Administration dated September 18, 1969, is part of the record. An administrative decision shows the Veterans Administration conclusion to be as follows:

> "It is determined that the child, Gregory B. Norton, Jr. is recognized by the Veterans Administration as the illegitimate child of the veteran and is entitled to death benefits based on the service of the veteran." (Exhibits 10, 11, & 12)

The certificate of live birth dated February 10, 1964, shows a Gregory Bernard Norton, Jr. was born to Laurie Marie Brown and Gregory Bernard Brown. The name



Brown was replaced with Norton. A Health, Education, and Welfare form shows that Gregory B. Norton last worked at the Park Heights Bowling Alley in 1964 and was in the Maryland Training School under a Maryland State training program. (Exhibit 14)

*Evaluation of the Evidence*

The Hearing Examiner agrees with the Veterans Administration administrative determination that there was sufficient evidence to indicate that Gregory B. Norton is the father of the child, Gregory B. Norton, Jr. The child was born on February 10, 1964 and almost from birth was in the care and custody of Marion B. Chiles. Clearly the evidence indicates that the wage earner was not "living with" either the mother of the child nor the child. The crucial period in this case is the support from the period of February 10, 1964, the birth of the child, through May 19, 1966, the date of the wage earner's death. At best, there is evidence from Laurie Brown in the form of a deposition that the wage earner gave $6 on two occasions and from other sources that he gave bottles, diapers, etc. at the time of the birth of the child. Further, the Hearing Examiner understands full well that the wage earner was a young boy and was not regularly gainfully employed during that period with exception of one slight reference to some work at the bowling lane. His earnings record shows that he earned $212.33 in 1964. There is insufficient objective evidence to indicate that the wage earner "supported" the child prior to going into the service. On February 28, 1965, approximately 1 year after the birth of the baby, claimant went into the service. The Hearing Examiner acknowledges that the wage earner in a letter asked for the birth certificate of the child and that record of birth was found with his personal affects. No allotment of support was made by Gregory B. Norton on behalf of Gregory B. Norton, Jr. prior to that date of his death, May 19, 1966. Further, the criteria of the Veterans Administration which is different from the Social Security Administra-

tion is not binding on the Social Security Administration. The Social Security Administration requires a proof of relationship as well as dependency and/or support to be established for Social Security benefits purposes. While the administrative determination of the Veterans Administration is not binding on the Social Security Administration, the evidence they developed is supportive of the Hearing Examiner's decision that Gregory B. Norton is the father of the child in question but is insufficient to establish a "living with or support" requirement of the Social Security Act.

*Findings of Facts*

The Hearing Examiner has considered all the evidence in this case, and based upon the preponderance of the credible evidence, makes the following specific findings:

1. That Gregory B. Norton is the father of Gregory B. Norton, Jr., born February 10, 1964.
2. That prior to going into the service, there is insufficient evidence that the wage earner, Gregory B. Norton, "supported" Gregory B. Norton, Jr. and the evidence indicates that the wage earner did not, while in the service, obtain an allotment of soldier's pay for the purpose of supporting the child aforementioned.
3. That Gregory B. Norton did not live with the child at the time of the wage earner's death so as to meet the dependency requirements within the meaning of Section 216(h)(3)(C) of the Social Security Act.

*Decision*

It is the decision of the Hearing Examiner that Gregory B. Norton, Jr. is the natural child of Gregory B. Norton, the wage earner, within the meaning of the Section 216 (h)(3) of the Social Security Act, but there is insufficient evidence of record to establish that other requirements of the Social Security Act were met so as to entitle



Gregory B. Norton, Jr. to benefits. Therefore, it is the decision of the Hearing Examiner that the child is not entitled to Child's Insurance Benefits on the wage record of Gregory B. Norton.

/s/ J. Robert Brown
J. ROBERT BROWN
Hearing Examiner
Bureau of Hearings and Appeals
707 N. Calvert St., Room 500
Baltimore, Maryland 21202

Date: August 6, 1971

APPENDIX B

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
P.O. Box 2518, Washington, D.C. 20013

January 19, 1972

Refer To: HA-C
212-48-8660

Bureau of
Hearing and Appeals

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mrs. Marion B. Chiles
o/b/o Gregory B. Norton
308 East Lorraine Avenue
Baltimore, Maryland 21218

Dear Mrs. Chiles:

Your request for review of the hearing examiner's decision has been carefully considered by the Appeals Council. The Council's consideration of your request has included all the evidence in your case, the law and regulations applicable to your claim, the hearing examiner's evaluation of the facts and the reasoning in his decision, and your reasons for believing your claim should be allowed.

The Appeals Council has concluded that the decision of the hearing examiner is correct. Further action by the Council would not, therefore, result in any change which would be of advantage to you. Accordingly, the hearing examiner's decision stands as the final decision of the Secretary in your case.

If you desire a review of the hearing examiner's decision by a court, you may commence a civil action in the district court of the United States in the judicial



district in which you reside *within sixty (60) days* from this date. See section 205(g) of the Social Security Act, as amended (section 405(g), Title 42, United States Code). If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant.

Sincerely yours,

Jackson C. Smith
Member, Appeals Council

cc:
Michael Berman, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, Marian B. Chiles, Individually and on behalf of all others similarly situated

v.

ELLIOT RICHARDSON, Secretary Department of Health, Education and Welfare, Individually and in his official capacity

C. Christopher Brown and Michael Berman, of Baltimore, Maryland, for plaintiff.

Harlington Wood, Jr., Assistant Attorney General, Harland F. Leathers and Bruce E. Titus, of Washington, D.C., George Beall, United States Attorney, and Jeffrey White, Assistant United States Attorney, of Baltimore, Maryland, for defendant.

Filed: December 22, 1972.

Blair, District Judge.

MEMORANDUM OPINION

This case involves an attempt by plaintiff, Gregory B. Norton, Jr., to establish his right to receive child's insurance benefits under the Social Security Act, 42 U.S.C. § 402(d) after the death of his father, Gregory B. Norton, Sr. Benefits have been denied him by the Secretary of Health, Education and Welfare who found that he failed to meet the requirements of 42 U.S.C. § 416 (h)(3)(c)(ii). This section requires that certain illegitimate children, to qualify under the Act as a child of the deceased wage earner, must prove, in addition to paternity, that they were living with or supported by the wage earner on the date of his death. Although Gregory proved he was the son of Gregory Norton, Sr.,



he failed to convince the Secretary that he had been living with or supported by his father when his father died. Two theories have been advanced in support of Gregory's right to receive benefits. The first is that the Secretary's decision rests on an incorrect interpretation of § 416(h)(3)(c)(ii) and is in error.[1] The second and alternative theory is that if the Secretary's interpretation is correct, § 416(h)(3)(c)(ii) should be held unconstitutional, its operation enjoined, and the Secretary directed by mandamus-like writ to commence payments.[2] Because the latter theory seeks an injunction against the enforcement of a federal statute on constitutional grounds, plaintiff has requested the convocation of a three-judge court. Plaintiff also seeks certification of the case as a class action and a preliminary injunction should the issue of the constitutionality of § 416(h)(3)(c)(ii) be reached.

Both sides have asked for summary disposition of the case, the pertinent facts being agreed upon. Defendant has moved for summary judgment or dismissal for failure to state a cause of action; plaintiff has responded with his own motion for summary judgment. As a preliminary matter, it must be determined which issues, if any, may be resolved by a single judge and which must be referred to a three-judge court for determination. Defendant contends that a three-judge court is not required, there being no substantial constitutional issue, and that judgment should be entered in favor of the Secretary on both claims by this court sitting as a single judge. Plaintiff counters that a three-judge court is required unless this court in its single judge capacity enters judgment in his favor, either because the Secretary's decision was wrong or the statute is unquestionably unconstitutional.

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[1] Jurisdiction for judicial review of the decisions of the Secretary of H.E.W. is provided by 42 U.S.C. § 405(g).

[2] Jurisdiction here is based on the general federal question provision of 28 U.S.C. § 1331 and on 28 U.S.C. § 1361, providing jurisdiction in mandamus actions against officers of the United States or its agencies.

The review of a decision of the Secrtary of H.E.W. is normally by a single judge court. Plaintiff is willing for this court to review the Secrtary's decision, but only if judgment will be awarded plaintiff and asks that the three-judge court decide the claim if judgment is not to be for plaintiff. The court, however, disagrees with plaintiff that the three-judge court should consider this issue. The review of the Secretary's decision, being an alternative to deciding a constitutional question, must be resolved before the constitutional claim is reached. *Wyman* v. *Rothstein*, 398 U.S. 275 (1970). Although the three-judge court would have pendent jurisdiction over this claim,[3] the recent authority is that the single judge, and not the three-judge court, should decide the non-constitutional claim. In *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970), the Supreme Court indicated that the preferred procedure for a three-judge court presented with such a claim "may well have been to remand to the single district judge for findings and determination of the statutory claim rather than encumber the district court, at a time when district court calendars are overburdened, by consuming the time of three federal judges in a matter that was not required to be determined by a three-judge court." Three-judge courts after *Rosado* have followed this suggestion and remanded the non-constitutional claim to the single judge for decision prior to their consideration of the constitutional issue. *Doe* v. *Gillman*, 347 F. Supp. 483 (N.D. Iowa 1972); *Hubert* v. *Saucier*, 347 F. Supp. 152 (N.D. Ga. 1972); *Linnane* v. *Betit*, 331 F. Supp. 868 (D. Vermont 1971);

[3] *Turner* v. *Fouche*, 396 U.S. 347, 354 (1970); *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U.S. 73, 80-85 (1960); *Zemel* v. *Rusk*, 381 U.S. 1, 5-7 (1965); *Flast* v. *Cohen*, 392 U.S. 83, 88-91 (1968); *Sterling* v. *Constantin*, 287 U.S. 378, 393-4 (1932). But, *cf. Perez* v. *Ledesma*, 401 U.S. 83, 86-7 (1971); *New York Central Securities Corp.* v. *U.S.*, 287 U.S. 12, 28-29 (1932); *Powell* v. *U.S.*, 300 U.S. 276, 289-90 (1937); *Pittsburgh & W.Va. Ry. Co.* v. *U.S.*, 281 U.S. 479, 488 (1930); *Hobson* v. *Hansen*, 256 F.Supp. 18, 21 (D.C.Cir. 1969); *Landry* v. *Daley*, 280 F.Supp. 929, 937 (N.D.Ill. 1967); *Jehovah's Witnesses in State of Wash.* v. *King County Hosp.*, 273 F.Supp. 488, 496-7 (W.D.Wash. 1967), *aff'd.* 390 U.S. 598 (1968).



*Saddler* v. *Winstead*, 327 F. Supp. 568 (N.D. Miss. 1971); *Woolfolk* v. *Brown*, 325 F. Supp. 1162 (E.D. Va. 1971); *Doe* v. *Hursch*, 337 F. Supp. 614, 616 (D. Minn. 1970). To this court there is no reason for the single judge to first send the non-constitutional claim to the three-judge court before deciding it. *Bryant* v. *Carlson*, 444 F.2d 353 (9th Cir. 1971), *cert. denied* 404 U.S. 967 (1971); *Kelly* v. *Illinois Bell Tel. Co.*, 325 F.2d 148 (7th Cir. 1963); *Chicago, Diluth & Georgian Bay Transit Co.* v. *Nimms*, 252 F.2d 317 (6th Cir. 1968); *Doe* v. *Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972); *Connecticut Union of Welfare Employees* v. *White*, 55 F.R.D. 481 (D.Conn. 1972). *Contra Weintraub* v. *Hanrahan*, 435 F.2d 461 (7th Cir. 1970); *Fort* v. *Daley*, 431 F.2d 1128 (7th Cir. 1970). In fact, it would be grossly inefficient to send a three-judge court a claim which will only be sent immediately back. This inefficiency is especially apparent if the single judge's decision resolves the case, for there is then no need to convene the three-judge court. *See, e.g., Kelly* v. *Illinios Bell Tel. Co.*, 325 F.2d 148 (7th Cir. 1963); *Doe* v. *Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972). Sending all claims to the three-judge court requires that the three-judges gather at least to remand, though they may never be required again in the case. *See, e.g., Doe* v. *Hursch*, 337 F. Supp. 614 (D. Minn. 1970). Even if the three-judge court is eventually required because of the single judge's decision, nothing would be more wasteful than having two federal judges re-do the work one judge has already completed when that work involves a claim not required by statute to be decided by a three-judge court. At a time when the burden of three-judge court procedure rests heavily upon the federal judiciary, there is little need to increase that burden with inefficiency. For this reason, the review of the Secretary's decision shall be done by this court alone and shall not be sent to a three-judge court.

In reviewing the Secretary's decision, the court notes that plaintiff does not contest the supporting facts upon which the decision rests. Instead, plaintiff attacks the conclusion drawn from these facts, contending that they

are sufficient to meet the requirement of § 416(h)(3)(c)(ii) that the deceased wage earner have lived with or supported his illegitimate child on the date of his death. The essential facts relevant to § 416(h)(3)(c)(ii) can, therefore, be briefly summarized. Gregory Norton, Jr. was born out of wedlock in 1964 to Gregory Norton, Sr., then 16, and Lauri Marie Brown, then 14. Both Gregory Norton, Sr. and Lauri Marie Brown were high school students living at home. They never married, nor did they ever live together. From the time of his birth to the present, Gregory Norton, Jr. has lived with and been under the care of his maternal grandmother, Mrs. Marion B. Chiles. When Gregory Norton, Jr. was born, Gregory Norton, Sr. apparently contributed $6.00 and some gifts of clothing and other baby habiliments, but never actually undertook the support of the child, being an unemployed student at the time. In February of 1965, Gregory Norton, Sr. entered the Army. He had at this point never lived with his son. On May 19, 1966, at age 19, Gregory Norton, Sr. was killed while serving in Vietnam. Prior to his death, Gregory Norton, Sr. attempted to authorize a child's military allotment which would have provided the child with regular support. Whether because of military red tape or some other reason, on the date of his death he had failed to complete the procedure which would have initiated the allotment payments. While it appears evident that at some point Gregory Norton, Sr. did intend to begin supporting his son, it is undeniable that at the time of his death such support had yet to commence.

Plaintiff does not maintain that § 416(h)(3)(c)(ii) was satisfied by a showing that Gregory Norton, Sr. was living with his son on the date of his death. Being in Vietnam, Gregory Norton, Sr. was obviously not living with Gregory Norton, Jr. and there is absolutely no evidence to suggest that Gregory Norton, Sr. ever attempted or even intended to live with his illegitimate child. Plaintiff's argument is that Gregory Norton, Sr.'s attempt to support his son, though admittedly unsuccessful, was all that had to be proven under a proper reading of the statute for Gregory Norton, Jr. to qualify for benefits



and that, for this reason, the Secretary's conclusion that Gregory Norton, Jr. was not supported by his father on the date of his death is not based on substantial evidence[4] and is erroneous. What plaintiff argues is that an applicant is not disqualified from receiving benefits by § 416(h)(3)(c)(ii) if the deceased did all that could reasonably be expected of him to live with or support the child. In support of this proposition, plaintiff cites numerous cases liberally interpreting § 416(h)(3)(c)(ii) along this line. *See Bridges* v. *Sec. of H.E.W.*, C.C.H. Unemployment Insurance Reports, ¶ 16,480 (E.D.N.Y. 1971); *Crisp* v. *Richardson*, C.C.H. Unemployment Insurance Reports, ¶ 16,612 (W.D.N.C. 1972); *Mobley* v. *Richardson*, C.C.H. Unemployment Insurance Reports, ¶ 16,439 (W.D.N.C. 1971); *Jackson* v. *Richardson*, C.C.H. Unemployment Insurance Reports, ¶ 16,767 (S.D.W.Va. 1972); *Wagner* v. *Finch*, 413 F.2d 267 (5th Cir. 1969).

While this court agrees that the provisions of the Social Security Act should be liberally construed in favor of coverage, even a liberal construction of § 416(h)(3)(c)(ii) would not extend coverage to Gregory Norton, Jr. under the precedents plaintiff relies on. In each of these cases, there had been some regular and continuous "living with" or "support by" the wage earner which for some unavoidable reason was interrupted on the date of the wage earner's death. For example, in *Bridges* v. *Secretary of H.E.W.*, C.C.H. Unemployment Insurance Reports, ¶ 16,480 (E.D.N.Y. 1971) the wage earner had been living with the mother and his illegitimate children in New York and had supported them from his wages. Tuberculosis first hospitalized him and then caused him to spend large amounts of his time in North Carolina caring for his health. He was forced to live on a Veterans Administration pension. Despite all of this, he regularly visited the mother and children. He died in North Carolina four months after having spent Thanks-

[4] 42 U.S.C. § 405(g) provides that the Secretary's finding of any fact—i.e. whether Gregory Norton, Jr. was supported by his father on the date of his death—is conclusive if supported by "substantial evidence."

giving with the family. The court ruled that the separation was caused by circumstances beyond the wage earner's control and that his children would not, for this reason, be barred from receiving benefits.

There is nothing in the record to indicate that Gregory Norton, Sr. had regularly or continuously lived with or supported his son and was prevented from so doing on the date of his death by circumstances beyond his control. The only evidence of any support at all is the small gifts provided when the baby was born and the attempt to establish a military pay allotment. When faced with evidence of only sporadic and insignificant contributions of support, the court found in *Johnson* v. *Finch*, C.C.H. Unemployment Insurance Reports, ¶ 16,646 (N.D.Tex. 1972) that the wage earner had not been supporting his illegitimate child, as contemplated by the statute. It follows *a fortiori* that a single, insignificant contribution does not qualify either. Although plaintiff argues that Gregory Norton, Sr. had done all within his power to support his illegitimate child, this is a conclusion the court cannot reach. Gregory Norton, Sr. made no real overture of support until he attempted to take out the military pay allotment and evidence is lacking to support the diligence of his effort in that regard. All that can be said conclusively about his attempt to support his son is that it failed and his support never began. An unsuccessful attempt to do an act required by the Social Security Act is not compliance. *Moore* v. *Richardson*, 345 F. Supp. 75 (W.D.Va. 1972). The Secretary's decision must, therefore, be affirmed.

Having found the Secretary's decision to be correct, the court must now consider plaintiff's constitutional claim. Plaintiff contends that § 416(h)(3)(c)(ii) violates the equal protection guarantee implicit in the Fifth Amendment of the Constitution by impermissibly discriminating against a certain class of illegitimate children. On the basis of the Supreme Court's decision in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the court is of the opinion that this claim raises a substantial constitutional issue which must, under 28



U.S.C. § 2282, be resolved by a district court of three judges. This court shall request the Chief Judge of this Circuit to convene a three-judge court to decide the constitutionality of the challenged statute. The request for certification as a class action and for a preliminary injunction shall be referred to the three-judge court.

Accordingly, the Secretary is entitled to summary judgment in his favor on the issue of whether his decision that Gregory Norton, Jr. was not entitled to child's insurance benefits was supported by substantial evidence.

/s/ C. Stanley Blair
C. STANLEY BLAIR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, Marian B. Chiles, Individually and on behalf of all others similarly situated

*v.*

ELLIOT RICHARDSON, Secretary, Department of Health, Education and Welfare, Individually and in his official capacity

JUDGMENT

In accordance with the court's opinion of even date finding that the decision of the Secretary denying child's insurance benefits to the plaintiff was supported by substantial evidence, summary judgment on that issue is hereby entered in favor of the Secretary this 22nd day of December, 1972.

/s/ C. Stanley Blair
C. STANLEY BLAIR
United States District Judge



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, Marian B. Chiles, Individually and on behalf of all others similarly situated

*v.*

CASPAR WEINBERGER, Secretary, Department of Health, Education and Welfare, Individually and in his official capacity

C. Christopher Brown and Michael Berman, of Baltimore, Maryland, for plaintiffs.

Harlington Wood, Jr., Assistant Attorney General, Harland F. Leathers and Bruce E. Titus, Attorneys, Department of Justice, Washington, D. C.; George Beall, United States Attorney for the District of Maryland, and Jeffrey White, Assistant United States Attorney, of Baltimore, Maryland, for defendant.

Before Winter, Circuit Judge, and Murray and Blair, District Judges.

Filed: Sept. 14, 1973

OPINION

Blair, District Judge.

Gregory Norton, Jr., on behalf of himself and all others similarly situated, challenges the constitutionality of § 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. § 416(h)(3)(C)(ii) and seeks to restrain its enforcement. This three judge court has been convened to decide the constitutional question. The case is before the court on cross-motions for summary judgment, the essential facts not being in dispute.

To understand the issues involved, it is important at the outset to examine the pertinent statutory framework.[1] Under the Social Security Act, the child of a deceased wage earner who was dependent on the wage earner at the time of the wage earner's death is entitled to child's insurance benefits. 42 U.S.C. § 402(d)(1)(C)(ii). A legitimate child, being the wage earner's offspring and presumed dependent, automatically qualifies for benefits. 42 U.S.C. §§ 416(e)(1) and 402(d)(3)(A). An illegitimate child also can receive benefits, but he or she must first qualify under one of several alternative provisions. An illegitimate child who could, under the intestacy law of the wage earner's domicile, inherit the wage earner's personality is eligible for benefits upon proof that the wage earner was the parent and that at the time of death, the wage earner lived with or contributed to the support of the child. 42 U.S.C. §§ 416(h)(2)(A), 416(e)(1), and 402(d)(3). An illegitimate who is the child of a marriage invalid because of the existence of an impediment when the marriage ceremony was performed is entitled to receive benefits. 42 U.S.C. §§ 416(h)(2)(B), 416(e)(1) and 402(d)(3). Or, an illegitimate may qualify for benefits if it is shown that the wage earner prior to his death either (1) had acknowledged in writing that the illegitimate child was his son or daughter, (2) had been decreed by a court to be the father of the illegitimate child, or (3) had been ordered by a court to contribute to the support of the illegitimate child because he was the father. 42 U.S.C. §§ 416(h)(3)(C)(i), 416(e)(1) and 402(d)(3). Those illegitimate children unable to provide a written acknowledgment, a paternity decree, or a support order may still qualify for benefits under 42 U.S.C. § 416(h)(3)(C)(ii), the challenged provision, if the wage earner is shown by evidence satisfactory to the Secretary to be the father and the wage earner was living with or contributing to the support of

[1] The pertinent provisions are set out in an appendix. Emphasis has been added to the language directly relevant to the court's explication of the statute.



the illegitimate child at the time of his death. 42 U.S.C. §§ 416(h)(3)(C)(ii), 416(e)(1) and 402(d)(3).

Gregory Norton, Jr., an illegitimate child, sought child's insurance benefits after the death of his reputed father, Gregory Norton, Sr. Not being able to provide a written acknowledgment of paternity and a paternity decree or support order never having been obtained during the lifetime of Gregory Norton, Sr., he was forced to rely on § 416(h)(3)(C)(ii) to establish his right to benefits. He was denied benefits by the Secretary of H.E.W. after the appeal board affirmed the hearing examiner's conclusion that he failed to meet the requirements of § 416(h)(3)(C)(ii). Although the hearing examiner found Gregory Norton, Jr. was the son of Gregory Norton, Sr., he held that Gregory Norton, Sr. was not living with or contributing to the support of his son at the time of his death. Suit was thereafter filed on Gregory Norton, Jr.'s behalf by his maternal grandmother, Marian B. Chiles, in the federal district court. Alternative relief was prayed. Plaintiff asked the court to either rule that the Secretary's decision denying benefits for failure to meet § 416(h)(3)(C)(ii)'s "living with or support by" requirement was incorrect and that Gregory Norton, Jr. had in fact qualified or, if the Secretary's decision was correct, to declare § 416(h)(3)(C)(ii)'s "living with or support by" requirement unconstitutional, enjoin its further enforcement, and direct the Secretary by mandamus-like writ to commence payments.

The single judge court, addressing the nonconstitutional claim first, *Wyman* v. *Rothstein*, 398 U.S. 275, 276 (1970); *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970), found the Secretary's decision was based on "substantial evidence" and correct under the terms of the statute. 42 U.S.C. § 405(g). The court then examined the constitutional claim, found it to be substantial, and requested the convening of a statutory three judge court to decide the constitutional question. *See Norton* v. *Richardson*, 352 F.Supp. 596 (D.Md. 1972).

## I.

Two preliminary points should be resolved before the merits of the constitutional issue are reached.

Plaintiff, at the oral hearing, requested this court to review the single judge's ruling as to the correctness of the Secretary's decision.

Earlier, plaintiff had requested the single judge to review the Secretary's decision, although the request was predicated on the condition that the single judge find that the Secretary's decision was not supported by substantial evidence. The single judge proceeded to decision of the question and concluded otherwise. Plaintiff now urges that the three-judge court has jurisdiction to review the Secretary's decision and indeed should do so, because if it rules that the Secretary's decision was erroneous because not supported by substantial evidence, the necessity of a decision on the constitutional question would be avoided. *Wyman* v. *Rothstein*, 398 U.S. 275, 276 (1970); *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970).

The right of a single judge on his own motion to decide nonconstitutional questions before asking that a three-judge court be convened is the subject of some dispute between the circuits.[2] It is a power which has been exercised, albeit in factual circumstances distinguishable from the case at bar. Manifestly, the writer was satisfied that he possessed the power. The three-judge court, however, takes no position on the correctness of the writer's views, because it is satisfied that the single judge's determination was correct. Stated otherwise, the three-judge court finds it unnecessary to determine if the single judge did or did not have authority to decide nonconstitutional questions on his own

[2] *Compare* Bryant v. Carleson, 444 F.2d 353, 358-59 (9th Cir.), cert. denied, 404 U.S. 967 (1971); Kelley v. Illinois Bell Telephone Co., 325 F.2d 148, 151 (7th Cir. 1963); Chicago, Duluth & Georgian Bay Transit Co. v. Nims, 252 F.2d 317, 319 (6th Cir. 1958); Doe v. Lavine, 347 F.Supp. 357, 359-60 (S.D.N.Y. 1972); Connecticut Union of Welfare Employees v. White, 55 F.R.D. 481, 485 (D.Conn. 1972); *with* Weintraub v. Hanrahan, 435 F.2d 461, 463 (7th Cir. 1970); Fort v. Daley, 431 F.2d 1128, 1132 n. 4 (7th Cir. 1970).



motion because if the question of the substantiality of the evidence to support the Secretary's determination were before it, it would arrive at the same result for the reasons advanced by the single judge.

The other preliminary point requiring initial consideration concerns plaintiff's request that the case be certified as a class action. The single judge deferred ruling on this point until this court was convened.[3] *See*, 352 F.Supp. at 601. Although the defendant has opposed such certification, the court believes the request is proper and should be granted. This action is clearly one coming under Rule 23(b)(2) in that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ." Moreover, the court finds the prerequisites of Rule 23(a) to have been met since "(1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. . . ." As required by Rule 23(c), the court defines the plaintiff class in this suit to include all of those persons otherwise eligible for child's insurance benefits under 42 U.S.C. § 402(d)(1) but who cannot qualify for such child's insurance benefits solely because they cannot meet the requirement of 42 U.S.C. § 416(h)(3)(C)(ii) that they be living with or supported by their father on the date of his death.

## II.

The constitutional challenge plaintiff presents is that 42 U.S.C. § 416(h)(3)(C)(ii), as written, violates the due process clause of the Fifth Amendment, which pro-

[3] Plaintiff also requested a preliminary injunction, which request was properly referred by the single judge to this court. 28 U.S.C. §§ 2282, 2284(5). Because the court today considers final relief, the preliminary injunction request is moot.

scribes irrational discrimination in federal legislative classifications. *United States Dept. of Agriculture* v. *Moreno*, 41 U.S.L.W. 5105 (June 25, 1973); *United States Dept. of Agriculture* v. *Murry*, 41 U.S.L.W. 5099 (June 25, 1973); *Frontiero* v. *Richardson*, 41 U.S.L.W. 4609 (May 14. 1973); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Schneider* v. *Rusk*, 377 U.S. 163 (1964); *Bolling* v. *Sharp*, 347 U.S. 497 (1954). Plaintiff contends that § 416(h)(3)(C)(ii) impermissibly discriminates against a sub-class of illegitimate children who, although they can prove their paternity, cannot qualify for child's insurance benefits because § 416(h)(3)(C)(ii) requires that they be living with or supported by their father on the date of his death. Plaintiff contends the requirement of proof that the father lived with or supported his illegitimate child is irrational and that this court, by a declaration of unconstitutionality and injunction, should excise the offending requirement from § 416(h)(3)(C)(ii) leaving the remainder of that section so as to permit any illegitimate child who can prove paternity able to qualify for child's insurance benefits if otherwise eligible.

Because the equal protection clause of the Fourteenth Amendment prohibits irrational discrimination in state legislative classifications, courts have utilized an equal protection type of analysis in evaluating federal legislation under the due process clause of the Fifth Amendment. *E.g.*, *United States Dept. of Agriculture* v. *Moreno*, 41 U.S.L.W. 5105 (June 25, 1973); *Frontiero* v. *Richardson*, 41 U.C.L.W. 4609 (May 14, 1973); *Richardson* v. *Belcher*, 404 U.S. 78 (1971). Before considering plaintiff's claim, it is first necessary to decide what equal protection standard should apply. Plaintiff contends strict scrutiny is appropriate; defendant, on the other hand, argues for the rational basis test.

Traditionally, two equal protection approaches have been used by the courts in evaluating legislation. Under one approach, commonly referred to as the "rational basis" test, a statute is evaluated to determine if it has some conceivably valid aim, and if the classification utilized in any way furthers that end.[4] The statute is presumed valid and any proper and related means are sufficient to uphold the statute against an equal protection challenge. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Two Guys from Allentown* v. *McGinley*, 366 U.S. 582 (1961). Only statutes, aimed at an end beyond the state's power to legislate, or which are patently arbitrary or lacking in rational justification are invalid under the rational basis test. *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Slanner* v. *Oklahoma*, 316 U.S. 535 (1942). *See generally*, *Note*, "Developments in the Law: Equal Protection", 82 Harv.L.Rev. 1065 (1969). Under the second approach, a legislative classification is evaluated to determine if it is based upon suspect criteria or imposes upon a fundamental, constitutionally secured right. If so, it is "inherently suspect" and "strict scrutiny" will be applied and the statute, no longer presumed constitutional, will be invalid under the equal protection clause unless it is directly related to a compelling governmental interest. Statutes subject to strict scrutiny bear a heavy burden of justification which few, if any, survive. *In Re Griffiths*, 41 U.S.L.W. 5143 (June 25, 1973); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964). *See generally*, *Note*, "Developments in the Law: Equal Protection", *supra*. Because of the disparity of results of the two approaches, many modern equal protection controversies have focused on whether a fundamental right or suspect criteria was involved. If so, the statute was usually held invalid; if not, the statute was frequently upheld.

The current Supreme Court in utilizing the rational basis test appears to now require legislation to have a closer nexus to its purpose than was customarily demanded under the rational basis test in earlier cases. Strict scrutiny, however, is still applied as a test when classifications are suspect or fundamental constitutional

[4] Courts have often shown considerable imagination in this regard. *See, for example*, Goesaert v. Cleary 335 U.S. 464 (1964); Kotch v. River Port Pilot Comm'rs., 330 U.S. 552 (1947).

rights are implicated. Thus, while a suspect class or fundamental right will still invoke strict scrutiny—*e.g.*, *In Re Griffiths, supra*—the court, when dealing with other classifications under the rational basis test, appears more willing to examine the relationship between a statute's means and ends than earlier courts and to require that the relationship be substantial. The means, it would seem, under the rational basis analysis, must bear a direct and primary correlation to an actual statutory goal or purpose. This new equal protection position was lucidly discussed by Professor Gunther in "The Supreme Court 1971 Term", 86 Harv.L.Rev. 1 (1972) and has been recognized by the Fourth Circuit in *Eslinger* v. *Thomas*, No. 72-1542 (4th Cir. March 28, 1973). *See also*, Mr. Justice Rehnquist's dissent in *Weber* v. *Aetna Casualty Co.*, 406 U.S. at 177 (1972).

Closely analyzing plaintiff's claim—as was done in *San Antonio School District* v. *Rodriguez*, 41 U.S.L.W. 4407 (March 21, 1973)—it is clear that this is not a case calling for the application of strict scrutiny. To begin, no suspect class is here involved. No case has yet, although there have been ample opportunities, held that a classification based upon illegitimacy is *per se* suspect as a classification involving status of birth. Moreover, the class § 416(h)(3)(C)(ii) establishes is not coterminous with the class of illegitimates; rather, the class it establishes is a specific sub-class of the group of illegitimates as a whole, for it is clear that many illegitimates can qualify under § 416(h)(3)(C)(ii) and other provisions in the Act. *Jiminez* v. *Richardson*, 353 F.Supp. 1356 (N.D.Ill. 1973). Strict scrutiny is thus not demanded because a suspect classification is at hand. And neither is there a fundamental, constitutional right of which § 416(h)(3)(C)(ii) deprives a class. It has been repeatedly held by recent Supreme Court decisions that there is no constitutional right to social welfare and that strict scrutiny does not apply to welfare legislation. *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Dandridge* v. *Williams*, 397 U.S. 471 (1970).



While strict scrutiny does not apply, it would appear this case calls for the application of the new rational basis approach. *Weber* v. *Aetna Casualty Co.*, 406 U.S. 164 (1972), perhaps the Supreme Court's most definitive pronouncement on the equal protection rights of illegitimates, emphasized the new approach. *See also*, Mr. Justice Rehnquist's dissent, *supra* at 177. In accordance with the direction of the Supreme Court's latest equal protection position, the court shall examine § 416(h)(3)(C)(ii) under the rational basis test to see if it bears a substantial relationship to the purpose of the Social Security Act and is free of invidious discrimination. *Reed* v. *Reed*, 404 U.S. 71 (1971); *Eslinger* v. *Thomas*, No. 72-1542 (4th Cir. March 28, 1973).

Several Supreme Court decisions have considered laws dealing with illegitimacy. It is within the framework of these decisions that the examination of § 416(h)(3)(C)(ii) must proceed. The first two cases—*Levy* v. *Louisiana*, 391 U.S. 68 (1968) and *Glona* v. *American Guarantee Co.*, 391 U.S. 73 (1968)—invalidated judicially construed restrictions in the Louisiana wrongful death statute which denied a right to recover on the basis of illegitimacy. In *Levy*, the court ruled that Louisiana could not prevent an illegitimate child from recovering for the wrongful death of its mother solely because the child was illegitimate where, had the child been legitimate, a right of recovery would have been provided. The court assumed the illegitimate child was dependent on its deceased mother in the economic, biologic, and spiritual sense and "in her death suffered wrong in the sense any dependent would." Rejecting the argument that the denial of a right of recovery promoted the morals and general welfare of the community by discouraging illegitimacy, the court found there was no sufficient reason for permitting a tort-feasor to escape his wrong merely because a child is illegitimate. The court, in concluding the statute denied equal protection, underscored the lack of any relationship between the legitimacy or illegitimacy of the child and the wrong inflicted upon the mother.

*Glona*, the companion case to *Levy*, similarly declared that the equal protection clause prevented Louisiana from

denying a mother a right to recover for the death of her child because the child was illegitimate. Louisiana's argument that its law discouraged sin was dismissed as "far-fetched," the court noting,

> It would, indeed, be farfetched to assume that women have illegitimate children so they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a casual connection with the "sin", which is, we are told, the historic reason for the creation of the disability. 391 U.S. at 75.

The court recognized the potential for fraudulent assertions of motherhood, but noted that this was a problem in burden of proof which had no application in cases where the claimant is "plainly the mother."

*Labine* v. *Vincent*, 401 U.S. 532 (1971), a 5 to 4 decision, affirmed Louisiana's intestacy law which denied illegitimates the right to inherit from their fathers even though publicly acknowledged. The court found Louisiana's interest in regulating family life and the disposition of property within its borders to provide a rational basis for the statute sufficient to withstand the equal protection challenge. The court distinguished *Levy* and *Glona* with the observation that, since a father could leave part of his property to a legitimated child (i.e.—one who was publicly acknowledged) the state had not erected an insurmountable barrier to the child's recovery, as was the case in the previous two decisions. The court felt that *Levy* and *Glona* did not prevent a state from ever treating illegitimates differently than legitimates and that Louisiana's disparity of treatment in its intestacy laws was constitutionally permissible.

Later decisions appear to have eroded the vitality of the majority's opinion in *Labine* and indicate that the minority view of the four dissenting judges, all of whom are still on the Court, is more in line with the Court's current stance. The minority opinion, authored by Mr. Justice Brennan, found the Louisiana intestate statute to invidiously discriminate against illegitimates without



rational justification and that the classifications established in the statute bore no intelligible or proper relationship to the consequences flowing from it. Mr. Justice Brennan noted that in *Levy*, an acknowledged illegitimate could have recovered and that, therefore, *Levy* did not involve an insurmountable barrier as the majority supposed. Moreover, he opined that merely because a discrimination fell short of providing an insurmountable barrier did not immunize it from the Fourteenth Amendment. In considering Louisiana's interest in dealing with problems of proof and reducing the opportunity for error, he stated that when formalities such as a public acknowledgment had been complied with, problems of proof abate.

> When a father has formally acknowledged his child or gone through any state authorized formality for declaring paternity, or when there has been a court judgment of paternity, there is no possible difficulty of proof, and no opportunity for fraud or error. This purported interest certainly can offer no justification for distinguishing between a formally acknowledged illegitimate child and a legitimate one. 401 U.S. at 552.

He felt that Louisiana's intestate statute was founded on the state's official policy of discrimination against illegitimates in matters of succession and inheritance and could not be justified as "a legislative judgment about the probable wishes of the deceased or the desires of most persons in similar situations." He recognized a contrary presumption when a father has made a public acknowledgment, commenting that "logic and common experience also suggest that a father who has publicly acknowledged his illegitimate child will *not* generally intend to disinherit his child." (emphasis original).

A key decision for this present case was rendered in *Weber* v. *Aetna Casualty Co.*, 406 U.S. 164 (1972), where the court invalidated under the equal protection clause a section of Louisiana's workman's compensation statute which denied dependent, unacknowledged illegitimate children the right to share equally with acknowl-

edged illegitimate and legitimate children. In *Weber*, the deceased, Henry Clyde Stokes, died of injuries received in his employment, leaving four legitimate children and two illegitimate children by the woman he had been living with since his wife's commitment to a mental institution. With the exception of one of the illegitimate children, who was born posthumously, all of the children, including the one illegitimate child, were living with and supported by him at the time of his death. Under the Louisiana law, unacknowledged illegitimate children were entitled to benefits only to the extent such benefits were not exhausted by the claims of the legitimate and acknowledged illegitimate children. Henry Stokes' illegitimate children were not acknowledged and could not be acknowledged under Louisiana law due to Stokes' still existing marriage to his institutionally-committed wife. Because of a large tort settlement against a third party tort-feasor in favor of the legitimate children alone, the workman's compensation benefits were extinguished, with the illegitimate children receiving neither part of the settlement nor any workmen's compensation benefits.

The court found the statute to lack a rational basis for its discrimination, following as precedent its decision in *Levy* which proscribed, in the court's view, inequality of treatment of dependent illegitimate children and distinguishing its earlier decision in *Labine* as reflecting "the traditional deference to a state's prerogative to regulate at death the disposition of property within its borders." The court placed primary emphasis upon the fact that, although dependency was a prerequisite to anyone's recovery, under the Louisiana workman's compensation statute, equal dependents were treated unequally.

> So far as the record shows, the dependency and natural affinity of the unacknowledged illegitimate child for her father were as great as those of the four legitimate children whom Louisiana law has allowed to recover. The legitimate children and the illegitimate child all lived in the home of the deceased and were equally dependent upon him for maintenance and support. . . . The unacknowledged



> illegitimate . . . is a *dependent child*, and as such, is entitled to rights granted other *dependent children*. (emphasis original). 406 U.S. at 169.

The court, again distinguishing *Labine*, pointed out that Louisiana had erected an insurmountable barrier for the illegitimates, since it was impossible for their fathers to acknowledge them so they would receive equal benefits under the statute. Rejecting the argument that the classification furthers Louisiana's interest in family relationships, the court concluded that "[t]he inferior classification of dependent unacknowledged illegitimates bears, in this instance, no significant relationship to those recognized purposes of recovery which workman's compensation statutes commendably serve."

The court, in arriving at its decision in *Weber*, took particular effort to point out that its decision in no way altered "the state interest in minimizing problems of proof. . . ." Louisiana's statute, while making dependency a prerequisite for recovery, also conclusively presumed that dependency was present for those children under 18 who were living with the parent at the time of the injury. The court found no fault with limiting recovery only to actual dependents and accepted the need to draw arbitrary lines in response to problems of proof. As the court wrote:

> Finally, we are mindful that States have frequently drawn arbitrary lines in workmen's compensation and wrongful death statutes to facilitate potentially difficult problems of proof. Nothing in our decision would impose on state court systems a greater burden in this regard. By limiting recovery to dependents of the deceased, Louisiana substantially lessens the possible problems of locating illegitimate children and of determining uncertain claims of parenthood. Our decision fully respects Louisiana's choice on this matter. It will not expand claimants for workmen's compensation beyond those in a direct blood and dependency relationship with the deceased and avoids altogether diffuse questions of affection and affinity which pose difficult probative problems.

> Our ruling requires equality of treatment between two classes of persons the genuineness of whose claims the State might in any event be required to determine. 406 U.S. at 174.

The court's view on this point, as will be related further on, is of crucial importance to this present case.

The next Supreme Court decisions on illegitimacy came in summary affirmances of two three judge court cases declaring unconstitutional § 403(a) of the Social Security Act as a denial of Fifth Amendment due process. *Davis* v. *Richardson*, 342 F.Supp. 588 (D. Conn.), *affirmed*, 409 U.S. 1069 (1972); *Griffin* v. *Richardson*, 346 F.Supp. 1226 (D. Md.), *affirmed*, 409 U.S. 1069 (1972). *See also*, *Morris* v. *Richardson*, 346 F.Supp. 494 (N.D. Ga. 1972), *vacated on other grounds*, 41 U.S.L.W. 3390 (January 15, 1973); *Maracle* v. *Richardson*, 348 F.Supp. 234 (S.D.N.Y. 1972); *Williams* v. *Richardson*, 347 F.Supp. 544 (W.D. N.C. 1972). Section 403(a) of the Social Security Act limited the benefits § 416(h)(3) children received to those that remained only after other qualifying children received a full share out of a maximum family allowance. Both *Davis* and *Griffin* found this discrimination to lack a rational relationship to the purpose of the Social Security Act. The courts noted that the Social Security Act set up a class of beneficiaries eligible for benefits but who were arbitrarily denied full participation rights. They pointed to the absence of proof problems resulting from the need of the § 416(h)(3) children to qualify initially and to the strong probability of actual dependency which must have been demonstrated to meet the requirements of § 416(h)(3). The courts discounted the government's argument that § 403(a) promoted family relationships and discouraged illegitimacy and found that § 403(a) denied due process of law.

The last Supreme Court decision instructive on this question was *Gomez* v. *Perez*, 41 U.S.L.W. 4174 (January 17, 1973).[5] Texas, while granting legitimate children a

[5] *See also*, Linda R.S. v. Richard D., 41 U.S.L.W. 4371 (March 5, 1973), an illegitimacy case which was dismissed for lack of standing.



judicially enforceable right to support from their fathers, denied the same to illegitimates. For this reason, the Texas courts denied the plaintiff's suit for support, although plaintiff had established paternity to the court's satisfaction. Juxtaposing the right afforded legitimate children with the denial of that right to illegitimate children, the court found an "unmistakeable" violation of equal protection rights. In the court's words:

> Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because her natural father has not married her mother. For a State to do so is "illogical and unjust." 41 U.S.L.W. at 4175.

While recognizing the "lurking problems with respect to proof of paternity" and admitting that they "are not to be lightly brushed aside," the court held that "neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."

Other Supreme Court cases, although not directly concerned with illegitimacy, have dealt with the problem of discrimination in social welfare legislation. The general principle established by these decisions is that invidious discrimination which is not rationally related to the statute's purpose is impermissible, *United States Dept. of Agriculture* v. *Murry*, 41 U.S.L.W. 5099 (June 25, 1973); *United States Dept. of Agriculture* v. *Moreno*, 41 U.S.L.W. 5105 (June 25, 1973). However, the cases recognize also that social welfare legislation cannot be expected to be surgically precise in its classification and the existence of some discrimination incidental to the statute's goal and the means used to achieve it will not make the statute constitutionally infirm under either the Fifth or Fourteenth Amendments. *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Richardson* v. *Belcher*, 404 U.S.

78 (1971); *Dandridge* v. *Williams*, 397 U.S. 471 (1970). What the Court stated in *Dandridge*, *supra* at 485, in regard to equal protection:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

it later reaffirmed in *Richardson*, *supra* at 84, for due process:

> We have no occasion, within our limited function under the Constitution, to consider whether the legitimate purposes of Congress might have been better served by applying the same offset to recipients of private insurance, or to judge for ourselves whether the apprehensions of Congress were justified by the facts. If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment.

The child's insurance benefits provision of the Social Security Act is founded on the dual concepts of parentage and dependency. To be eligible for benefits, a claimant must be both the child of and dependent upon the deceased wage earner. 42 U.S.C. § 402(d)(1). The purpose of the Act, consistent with this dual concept, is to replace the support lost to a child when the wage earner dies. What must now be determined is whether § 416(h)(3)(C)(ii)'s requirements bear a direct and substantial relationship to this purpose.

Plaintiff, not disputing the dependency focus, argues that the Social Security Act does not require actual dependency, but is satisfied by potential dependency. What the benefits provided are intended to replace is not actual support, but the loss of the right to support.



While this contention is facilitating to plaintiff's position, it is not, in this court's opinion, consistent with the Act's purpose, intent, or requirements. In amending the Social Security Act to include § 416(h)(3), the Senate Report described the Act as "a national program that is intended to pay benefits to replace the support lost by a child when his father . . . dies. . . ." Senate Report No. 404, 1965 U.S. Code Congressional and Administrative News, p. 2050. The cases interpreting the child's insurance provisions have similarly concluded that the Act is founded on actual dependency. *Davis* v. *Richardson*, 342 F.Supp. 588 (D. Conn.), *affirmed*, 409 U.S. 1069 (1972); *Jiminez* v. *Richardson*, 353 F.Supp. 1356 (N.D. Ill. 1973); *Watts* v. *Veneman*, 334 F.Supp. 482 (D. D.C. 1971), *affirmed in part, reversed in part on other grounds*, 476 F.2d 529 (D.C.C. 1973). Moreover, the mere fact that the provision plaintiff challenges requires proof of actual dependency belies the conclusion that the Act is directed to potential dependency.[6]

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[6] Plaintiff cites, in suport of his position that potential dependency or the right to support are all that is required, a section of House Senate Conference Committee Report on the 1965 Amendment to the Social Security Act adding 42 U.S.C. § 416(h)(3), 111 Cong. Record 18387, which reads as follows:

> A child would be paid benefits based on his father's earnings without regard to whther he has the status of a child under State inheritance laws if the father was supporting the child or had a legal obligation to do so.

While the report speaks of paying benefits if "the father was supporting the child or had a legal obligation to do so," it was not speaking of § 416(h)(3)(C)(ii) alone, but was also talking in reference to § 416(h)(3)(C)(i) which established the paternity decree, court order, or written acknowledgment test. Illegitimates who could establish claims under § 416(h)(3)(C)(i) would, in most instances, legally be entitled to support from their fathers. Such was not always the case with illegitimates unable to meet § 416(h)(3)(C)(i)'s criteria. *See, e.g.*, Gomez v. Perez, 41 U.S.L.W. 4174 (January 17, 1973). This legislative history does not, from this court's reading, establish that the Social Security Act is based on potential, rather than actual, dependency. Rather, the report is descriptive of the Act's effect.

The whole thrust of § 416(h)(3)(C)(ii) is that of determining both the biological connection and the dependency required by the Act for benefits. The provision requires some proof sufficient to the Secretary of actual paternity. It then requires proof that the illegitimate child whose paternity is proven establish either that he or she actually was supported by the wage earner on the date of his death or, alternatively, that he or she lived with the wage earner on the date of his death, the presumption being that a wage earner's children who live with him are supported by him. Those children who prove § 416(h)(3)(C)(ii)'s dual elements satisfy the Social Security Act's prerequisites of being the wage earner's child and dependent upon him, and, if otherwise qualified, they share equally with all other qualified dependent children of the deceased wage earner.

A statute can treat illegitimate children differently than legitimate children as long as the distinction is based upon rational grounds. *Labine* v. *Vincent*, 401 U.S. 532 (1971); *cf. Weber* v. *Aetna Causalty Co.*, 406 U.S. 164 (1972); *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Glona* v. *American Guarantee Co.*, 391 U.S. 73 (1968). It is not invidious discrimination to require § 416(h)(3)(C)(ii) children to establish the dual elements of paternity and dependency when such is not required of legitimates and those illegitimates qualifying under § 416(h)(2)(B) or § 416(h)(3)(C)(i). The parentage of legitimate children is not in issue and it is clearly rational to presume the overwhelming number of legitimate children are actually dependent upon their parents for support. Likewise, the parentage of the children of an invalid marriage would not normally be in dispute and such children would typically live in the wage earner's home or be supported by him. Although the illegitimate § 416(h)(3)(C)(i) children need not offer proof to the extent the § 416(h)(3)(C)(ii) children must, it is rational to afford them the same presumptions as the legitimate children or children of invalid marriages. For those with a paternity decree or support order, a judicial tribunal will have already addressed the parentage issue and resolved it for the illegitimate child. When an order of support is entered by a court, it is reasonable to assume compliance



occurred. A paternity decree, while not necessarily ordering support, would almost as strongly suggest support was subsequently obtained. Conceding that a written acknowledgment lacks the imprimatur of a judicial proceeding, it too establishes the basis for a rational presumption. Men do not customarily affirm in writing their responsibility for an illegitimate child unless the child is more likely to provide it support than one who does not. To presume the acknowledged child's paternity and dependency is rational.

Unlike the statute in *Weber*, which treated equal dependents unequally, the Social Security Act now affords full equality of treatment between dependent legitimates and dependent illegitimates. It does not treat legitimate children differently from illegitimate children; what it does is treat differently those likely to be the dependent children of the wage earner from those not as likely to be by requiring further or substantiating proof from the latter. That Congress has permitted some simplified, formalistic proof to suffice for the § 416(h)(3)(C)(i) illegitimate children is not impermissible discrimination. The dissent in *Labine* recognized the propriety of establishing formalities like an acknowledgment to surmount problems of proof. In like manner, the *Weber* court, as before mentioned, recognized that arbitrary lines as to problems of proof occasionally must be made and emphasized that its decision fully respected the statutory choice as long as those equally within the statute's purpose were not treated unequally under the statute.[7]

The Social Security Act has not placed impenetrable barriers of proof before illegitimates who seek to qualify. *Labine* v. *Vincent*, 401 U.S. 532 (1971); *cf. Weber* v. *Aetna Casualty Co.*, 406 U.S. 164 (1972). It provides in

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[7] Other arbitrary lines having nothing to do with illegitimacy are also perforce drawn in defining benefit entitlement consistent with the Act's purpose. For instance, a 19-year-old who was not a full time student or disabled, although perhaps dependent, would not be eligible for benefits. 42 U.S.C. § 402(d)(1)(B). Nor would a 16-year-old married child of the wage carner, no matter how dependent, be able to obtain child's insurance benefits. 42 U.S.C. § 402(d)(1)(B).

§ 416 (h) (3) (C) (i) alternative and simplified methods of proof consistent with the Act's purpose, and for those unable to utilize the formalistic methods, it provides a catch all provision—§ 416 (h) (3) (C) (ii)—designated to enable those the Act intended to cover to qualify. Under the Social Security Act, an illigitimate child has a variety of ways of demonstrating entitlement, none of which are impervious to any illegitimate factually within the Act's intendment.

This is not a situation similar to *Gomez* v. *Perez*, 41 U.S.L.W. (January 17, 1973), where Texas law afforded illegitimates no rights while affording rights to legitimates. Here, the Social Security Act permits illegitimates who can prove entitlement to receive benefits. The court believes that the Supreme Court in *Gomez* would have found no denial of equal protection had Texas law enabled illegitimates to obtain paternal support to the same extent as legitimates provided they demonstrated their entitlement by proving their paternity to the court. Nor does this court believe the *Gomez* court, which recognized the "lurking problems with respect to proof of paternity," would have found a denial of equal protection in requiring some illegitimates to prove their paternity before support was ordered when such was not required of legitimates or certain illegitimates who had complied with statutorily defined formalities regarding the question of proof.

Plaintiff's problem—and the underlying reason for his failure to qualify—is that the child's insurance benefits provisions of the Social Security Act were never intended to cover Gregory Norton or the class he represents. These provisions were designed, not to provide support a child never had, but to replace support lost on the death of the wage earner upon whom the child depended. This choice was unquestionably one Congress, faced with finite resources, could make. *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Dandridge* v. *Williams*, 397 U.S. 471 (1970). Although Gregory Norton, Jr. may well have been the child of Gregory Norton, Sr., he was never supported by his father. Because of this lack of dependency, he was never



intended by Congress to receive the wage benefits Gregory Norton, Sr. may have earned. In short, he could not comply with the dependency prerequisite in the Social Security Act. And as the Court in *Weber* made clear, a statute providing benefits to a deceased's children can make dependency a prerequisite to entitlement and thereby solve potentially difficult problems of proof as long as all dependents are treated equally.

What plaintiff would have the court do is excise the dependency requirement from the statute and thereby permit anyone to recover who can prove paternity.[8] Yet, as has been said, the Constitution does not require this of the legislature, dependency being a permissible legislative criterion. *Weber* v. *Aetna Casualty Co.*, 406 U.S. 164 (1972). Whatever may be the wisdom or desirability of providing a dole for all needy children, it is certain that Congress has not done so with the Social Security Act and this court, sitting as arbiter of a constitutional issue, cannot legislate for Congress. The dependency requirement is but one of two prerequisites. Just as this court cannot eliminate the parentage requirement for those children who were dependent on the wage earner but who were not the wage earner's offspring, this court cannot eliminate the dependency requirement for those children who can prove their parentage but who were never dependent on the wage earner.

The lack of coverage for non-dependents in the Social Security Act distinguishes the present case from *Levy* v. *Louisiana*, 391 U.S. 68 (1968). The Supreme Court in *Levy*, assuming the illegitimate child had the same affinity for and dependency on its mother as any legitimate child, pointed to the lack of any nexus between Louisi-

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[8] Were the court inclined to agree with plaintiff, the relief requested presents practical problems of its own. A court can excise part of an unconstitutional statutory provision only when the remainder will not alter the purpose, scope or operation of the statute in a way the legislature never intended. United States v. Jackson, 390 U.S. 570, 585 (1968); Fowler v. Gage, 301 F.2d 775, 778 (1962); Poe v. Menghini, 339 F.Supp. 986, 996 (D.C.Kan. 1971). To excise the dependency requirement from § 416(h) (3)(C)(ii) would completely alter the purpose, scope and operation of the Social Security Act. Yet if this provision were struck down in its entirety, plaintiff's claim would be completely barred.

ana's denial of a right of recovery for wrongful death and the wrong inflicted the child on the death of its mother. Such a nexus does exist in the denial of benefits to Gregory Norton for, never having received support from his father, there was no support for the Social Security Act to replace. While the denial of recovery to the illegitimate child in *Levy* lacked a connection to the purpose of the wrongful death statute, the denial of benefits to Gregory Norton directly emanates from the Social Security Act's *raison d'etre*. Moreover, in this present case, no wrongdoer—i.e. tort-feasor—receives a windfall from dscrimination against a hapless illegitimate who is barred from seeking compensation for a wrong done him. Rather, in this case, a class of children not dependent seeks the right to share equally with those who are. Those who never were supported by their wage earner fathers seek a benefit at the potential expense of others who were so supported.[9]

Moreover, past cases have demonstrated that, under the view that the Social Security Act should be construed to include rather than exclude, the dependency requirement will be liberally interpreted to avoid fortuitous hardship. In *Weber*, the Court noted that in its view, a posthumous illegitimate child, albeit unable to exhibit comparable dependency and affinity to a parent as could a child living at the time of the parent's death, should be treated the same as a posthumous legitimate child. The Social Security Act would provide coverage to a posthumous legitimate child and, under judicial construction, would similarly provide benefits for posthumous illegitimate children born into a household which the deceased wage earner

[9] While it is true the benefits in Gregory Norton's case will never be used if not for him, such would not always be the case, for the maximum benefits are frequently exhausted without all eligible children receiving a full entitlement. *See, e.g.*, Griffin v. Richardson, 346 F.Supp. 1226 (D.Md. 1972) *affirmed*, 409 U.S. 1069 (1973); Davis v. Richardson, 342 F.Supp. 588 (D.Conn. 1972), *affirmed*, 409 U.S. 1069 (1973). Although it may not be inequitable or uncharitable to permit Gregory Norton to receive the benefits in preference to their lapsing, for the court do so so would, because of the class action as of the case, if not by *stare decisis* alone, lay the groundwork for future inequities.



was either living in or supporting at the time of his death. This was the specific holding of the Fifth Circuit in *Wagner* v. *Finch*, 413 F.2d 267 (5th Cir. 1969). Other courts along this same line have construed the living with or support by requirement of § 416(h)(3)(C)(ii) liberally in face of hardship, and have indicated that in the proper case the arbitrary, although permissible, line drawn that dependency exists at the time of death will not bar an otherwise just claim. *Jackson* v. *Richardson*, CCH Unemployment Insurance Reports, ¶ 16,767 (S.D.W.Va. 1972); *Crisp* v. *Richardson*, CCH Unemployment Insurance Reports, ¶ 16,612 (W.D.N.C. 1972); *Bridges* v. *Sec. of HEW*, CCH Unemployement Insurance Reports, ¶ 16,480 (E.D.N.Y. 1971); *Mobley* v. *Richardson*, CCH Unemployement Insurance Reports, ¶ 16,439 (W.D.N.C. 1971).

Those courts which have considered the question of whether the Social Security Act can require proof of dependency from illegitimates have found the requirement permissible.[10] *Beaty* v. *Weinberger*, No. 72-1356 (5th Cir., April 23, 1973); *Perry* v. *Richardson*, 440 F.2d 677 (6th Cir. 1971); *Watts* v. *Veneman*, 334 F.Supp. 482 (D.D.C. 1971), *affirmed in part, reversed in part on other grounds*, 476 F.2d 529 (D.C.Cir. 1973). This court also, for the reasons stated, concludes the dependency requirements of § 416 (h)(3)(C)(ii) do not invidiously discriminate against illegitimates or lack of rational relation to the Social Security Act's purpose or intent. Section 416 (h)(3)(C)(ii) does not, therefore, violate the due process clause of the Fifth Amendment.

Because of the court's conclusion, summary judgment for defendant shall be entered separately under Rule 58, Fed.R.Civ.P. Counsel for defendant, with notice to counsel for plaintiff, shall submit a form of judgment

[10] In fact, in every lower court and Supreme Court case where impermissible discrimination against illegitimates was invalidated, with the exception of Gomez v. Perez, 41 U.S.L.W. 4174 (January 17, 1973), the illegitimates were either found or assumed by the court to be actually dependent. The *Gomez* case is exceptional only because it dealt with an illegitimate child's right to become dependent.

in accordance with this opinion. The Clerk is directed to forward copies of this opinion to counsel.

/s/ Harrison L. Winter
HARRISON L. WINTER
United States Circuit Judge

/s/ Herbert F. Murray
HERBERT F. MURRAY
United States District Judge

/s/ C. Stanley Blair
C. STANLEY BLAIR
United States District Judge



## APPENDIX

42 U.S.C. § 402—Child's insurance benefits

(d) (1) *Every child (as defined in section 416(e)* of this title) of an individual entitled to old-age or disability insurance benefits, or *of an individual who dies a fully or currently insured individual, if such child* —

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and

(i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 18, and

(C) *was dependent upon such individual*

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, *at the time of such death*, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

*shall be entitled to a child's insurance benefit* for each month, beginning with the first month after August 1950 in which such child becomes so. . . .

* * * *

(d) (3) *A child shall be deemed dependent upon his father* or adopting father or his mother or adopting mother *at the time specified in paragraph (1)(C) of this subsection unless, at such time, such indiivdual was not living with or contributing to the support of such child and—*

(A) *such child is neither the legitimate nor adopted child of such individual,* or

(B) such child has been adopted by some other individual.

*For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.*

42 U.S.C. § 416—Additional definitions

For the purposes of this subchapter—

*(e) The term "child" means (1) the child* or legally adopted child *of an individual,* and (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died . . .

42 U.S.C. § 416 (h) (2)—Determination of family status

(A) *In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of interstate personal property* by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, *by the courts of the State in which he was domiciled at the time of his death,* or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. *Applicants who according to such law would have the same status relative to taking interstate personal property as a child or parent shall be deemed such.*

(B) *If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be*



*deemed to be the child of such insured individual if* such insured individual and *the mother or father,* as the case may be, *of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.*

42 U.S.C. § 416(h) (1) (B) (last sentence)

*. . . For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage.*

42 U.S.C. § 416(h)

(3) *An applicant who is the son or daughter* of a fully or currently insured individual, *but who is not (and is not deemed to be) the child* of such insured individual under paragraph (2) of this subsection, *shall nevertheless be deemed to be the child* of such insured individual *if:*

*(C) in the case of a deceased individual—*

*(i) such insured individual—*

*(I) had acknowledged in writing that the applicant is his son or daughter,*

*(II) had been decreed by a court to be the father of the applicant, or*

*(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,*

*and such acknowledgment, court decree, or court order was made before the death of such insured individual, or*

*(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.*



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, Marian B. Chiles, Individually and on behalf of all others similarly situated, PLAINTIFF

v.

CASPAR W. WEINBERGER, Secretary, Department of Health, Education and Welfare, DEFENDANT

ORDER

This matter having come before the Court on Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment and the Plaintiff's Motion for Summary Judgment and the Court having considered the pleadings and the briefs filed by the parties, and having heard the argument of counsel, and being fully advised in the premises, and the Court having concluded that there is no disputed issue of material fact and that the defendant is entitled to judgment as a matter of law, it is hereby this 27th day of September 1973,

ORDERED that defendant's Motion for Summary Judgment be and is hereby granted and summary judgment be and is hereby entered in defendant's favor and the action is dismissed and it is

FURTHER ORDERED that plaintiff's motion for summary judgment is denied.

/s/ Harrison L. Winter
HARRISON L. WINTER
United States Circuit Judge

/s/ Herbert F. Murray
HERBERT F. MURRAY
United States District Judge

/s/ C. Stanley Blair
C. STANLEY BLAIR
United States District Judge



SUPREME COURT OF THE UNITED STATES

No. 73-5598

GREGORY NORTON, JR., a minor, etc., APPELLANT

*v.*

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare

ON CONSIDERATION of the motion of the appellant for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

June 24, 1974

SUPREME COURT OF THE UNITED STATES

No. 73-5598

GREGORY NORTON, JR., a minor, etc., APPELLANT

*v.*

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare

APPEAL from the United States District Court for the District of Maryland.

THIS CAUSE having been submitted on the statement of jurisdiction and motion to affirm,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland for further consideration in light of Jimenez v. Weinberger, 417 U.S. —— (1974).

June 24, 1974



ATTACHMENTS TO PLAINTIFFS' MEMORANDUM ON REMAND FROM THE SUPREME COURT

*CITY SEEKING AID TO ENFORCE SUPPORT-PAYMENT COLLECTION*

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[Jan. 11, 1971—M]

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Non Support

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By G. JEFFERSON PRICE 3d

The D'Alesandro administration will present a bill to the City Council today which would authorize a $90,000 grant to the Supreme Bench to help enforce the collection of millions of dollars in court-ordered support payments by derelict parents and spouses.

The funds would be made available by the State Department of Social Services and used by the Department of Probation, which would force the collection of the overdue payments on behalf of families now on the state's welfare rolls, according to Nicholas C. Mueller, chairman of the State Board of Social Services.

Raleigh C. Hobson, the director of the State Social Services Administration, estimated yesterday that there is more than $10 million outstanding in uncollected support payments.

*Collection Rate Under 25 P.C.*

Under the present system, he explained, the Supreme Bench has been able to bring judgments against the derelict parents and spouses, but there has been no one responsible for enforcing the orders. The collection rate is less than 25 per cent, he added.

Mr. Muller estimated that once the collection force of about 10 persons is established, the court might be able to force the collection of about $5 million in the first year.

The money would be turned over to the state and federal governments as a reimbursement for the amounts they have paid in welfare to the families affected by the non-payments. Three percent of the amount collected would go to the city, Mr. Hobson said. Thus, he reasoned, the program would support itself after the first year.

Although the expenditure involved is relatively small, and it comes at no initial cost to the city, the measure is not expected to pass through the Council without some strong opposition.

One of the most vocal opponents is expected to be Mrs. Janet Hofman, the Council's fiscal adviser, who has fought the plan in the past.

First, she feels that there is a matter of principle involved in that the Supreme Bench is a state responsibility. The money, in effect, would be going from one state agency to another, and she questions the necessity of going through the Council for approval. Secondly, she reasons, city's having to pay for the measure could result in the city's having to pay for the collection force out of its own budget if the state were to decide at some time in the future that it would no longer finance the project.

*Charter Requirement*

Mr. Hobson said yesterday that the transfer of funds must be approved by the Council because of a requirement in the City Charter. Also, he said, the Supreme Bench does not have the mechanism for paying the salaries of the collection force. The Bench and the Department of Social Services want the employees to be part of the Department of Probation, whose salaries are paid by the city, even though they are not subject to the city's civil-service requirements.



## *COMPUTER PUTS NONSUPPORT AT $65 MILLION IN CITY*

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Divorce and The Courts

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[Mar. 27, 1973—E]

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By GEORGE HANST

A computer report indicates that men who are under Baltimore court orders to support their wives and children are behind in their payments by $65 million.

William L. Quirk, director of the Probation Department of the Supreme Bench, admits the existence but questions the accuracy of the figure produced by the computer that monitors the 44,000 cases under his supervision.

*May Have Ended*

"It's a machine figure," Mr. Quirk said. "I don't know what it represents."

Mr. Quirk explained that a man's support obligations may have been ended for some time, but unless someone tells the Probation Department the computer continues to accumulate arreages against him.

The director said there is "no clear way of saying how much money is legitimately owed." He added, however, that "it's a lot."

Mr. Quirk said the cases, some as old as 20 years, would have to be processed and followed up individually in order to obtain an acccurate figure of arreages.

Even then, part of the backlog would be uncollectible, because some of the men are in prison or otherwise have no money, he said.

*Believed Uncollectible*

Mr. Quirk said the cost of examining the arrearages on a case-by-case basis would have to be measured against the increased payments that such an investigation might generate.

The director said he believes that a concentrated effort would only reveal "dollars that aren't there anyway"—the uncollectible accounts.

Mr. Quirk has a staff of 33 to manage the 44,000 cases. The case load involves some 39,000 persons, but many of them are under two or more separate court orders, which accounts for the higher number of cases.

The director said he has pleaded for extra personnel for 15 years but has been given no additional staff since 1967.

*Improvement Hopes*

"But the cases still keep coming," he said.

"I know I'm doing the best I can with what I've got," Mr. Quirk said. "We hope to do better and develop ways to do better."

He said he expects a greater potential and more resources when the department goes under the state probation system July 1.

Mr. Quirk said his department is making a "crash" effort to keep on top of cases filed since September 15, with moderate success.

*Dunning Letter*

"We don't have the people to do it, it means something else goes," he said.

The department also is studying the effect of a dunning letter sent to about 1,600 persons who have fallen behind in payments, he said.

The department will evaluate what the effort did to raise the level of payments and determine whether another sample mailing can be managed.

The returns from the first mailing between February 22 and March 9 are inconclusive and illustrate the problem the department has in enforcing support orders, Mr. Quirk said.



*35 P.C. Undeliverable*

Fully 35 per cent of the letters could not be delivered because the addressee was unknown or had moved, Mr. Quirk said.

Another 58 per cent had not responded to the letter by March 20, he said.

"I could dun everybody, then run for the hills," Mr. Quirk said, recalling the outcome of the arrearage notices sent to 29,000 persons at one time in October, 1970.

Within two days, Mr. Quirk said, there was a line of people all around the block, and the staff had to work overtime for two weeks, but only 10 per cent of the letters brought a response.

"If we got all of them in, the jail wouldn't be big enough, and the court would be tied up," Mr. Quirk said.

He said that nonsupport "is not a critical area of the law" to most observers.

Mr. Quirk said the person who fails to support his family "is the worst offender, worse than the guy who hits you over the head."

The family deserter's child "is the one who drops out of school; his daughter gets pregnant, his boy is the one who hits you over the head," Mr. Quirk said.

"The fact that he pays (support) doesn't help the situation; the family is still broken," he said.

*Quicker Involvement*

Mr. Quirk, an advocate of a family court system that would put all domestic relations problems in one jurisdiction, said the probation department should be involved as soon as cases are instituted rather than later.

"A divorce order may come down today, saying the support order is effective a month ago," Mr. Quirk said. The man "is in arrears from the beginning. He knows he can't pay, we know he can't pay, but that's what the order says."

Situations that change support obligations include the death of the father, or the marriage of a dependent teenager.

"The People we deal with are usually the last ones to come and tell us if the situation changes," Mr. Quirk said.

*Greater Liaison Urged*

Judge Solomon Liss of the Supreme Bench initiated a series of conferences over the past few months that suggested greater liaison between agencies that have an interest in enforcing support orders.

The meetings brought together representatives from the state's attorney's office, the attorney general's office, the District Court, the sheriff's office, the probation department, the Police Department, the city department of social services, and the state Social Services Adminisration.

The agencies promised to exchange information to help locate parents failing to pay support and recommended jailing those who refuse to pay.

*SUPPORT PAYMENTS INCREASE*

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Child Support—Baltimore

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[Oct. 18, 1973—M]

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By GEORGE J. HILTNER

A conference of social, domestic relations, probation and prosecution officials was told yesterday that support payments for children and wives increased by more than $300,000 following a crackdown by Judge Meyer Cardin last year.

The increase in receipts also resulted in the removal of a number of welfare receipients from the rolls, according to Lloyd A. Anderson, assistant director for income maintenance of the city Department of Social Services.



Judge Cardin found while sitting in the domestic relations court that mothers receiving welfare payments for themselves and their children often refused to appear in court to prosecute their husbands or the fathers of their children.

He threatened them with incarceration, and in one instance sent a recalcitrant mother to jail for failing to obey a court summons, the judge said.

When word reached the welfare community regarding the judge's actions, contributions from the fathers, many of whom were actually living with their families, began to increase and many of the recipients took themselves off relief rolls, the judge was told.

Mr. Anderson said contributions by fathers still are on the increase, and an average of 15 welfare cases a month are being dropped. Costs for medical care and food stamps also are dropping as a result, he noted.

The conference was told further that a search of welfare lists revealed that dating back to 1969 there were 8,667 men under court order who owed almost $20 million in support payments.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, Marian B. Chiles, Individually and on behalf of all others similarly situated

*v.*

CASPAR W. WEINBERGER, Secretary, Department of Health, Education and Welfare, Individually and in his official capacity

C. Christopher Brown, of Baltimore, Maryland, for plaintiffs.

Carla A. Hills, Assistant Attorney General, Harland F. Leathers and Bruce E. Titus, Attorneys, Department of Justice, Washington, D.C.; George Beall, United States Attorney for the District of Maryland, and Jeffrey White, Assistant United States Attorney, of Baltimore, Maryland, for defendant.

Before Winter, Circuit Judge, and Murray and Blair, District Judges.

Filed: February 28, 1975

OPINION

Blair, District Judge.

Our judgment in *Norton* v. *Weinberger*, 364 F. Supp. 1117 (D. Md. 1973)[1] was vacated and the case remanded by the Supreme Court for reconsideration in light of *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). Upon reconsideration, aided by the briefs and arguments of counsel, we are persuaded that *Jimenez* neither compels nor justifies any change in our earlier opinion and judgment. We will review briefly the two decisions and note our reasons for this conclusion.

[1] *See also* Norton v. Richardson, 352 F. Supp. 594 (D.Md. 1972).



*Our Decision in Norton*

Gregory Norton, although shown by evidence satisfactory to the Secretary to be the child of a deceased insured individual, was denied benefits under 42 U.S.C., §§ 402(d)(1), 402(d)(3), 416(h)(3)(C)(ii) because it could not be shown that prior to his death his father had lived with or contributed to his support. Not being eligible for benefits under any other provisions of the Act, Norton sought, among other relief, a declaration of the unconstitutionality of § 416(h)(3)(C)(ii). We held that the denial of benefits to Norton because he was not dependent on his father within the terms of the Act did not deny him equal protection of the laws as guaranteed by the due process clause of the Fifth Amendment. While our earlier opinion in *Norton* speaks for itself and need not be repeated here, a few points should be noted.

First, on the issue of the constitutionality of the statute's scheme for showing dependency, we refused to hold that illegitimacy is a "suspect classification." Thus, we refused to apply a "strict scrutiny" or "compelling governmental interest" standard in reviewing the Act. Rather, we applied the type of equal protection analysis which the Supreme Court discussed in *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972).

Second, we rejected the plaintiff's suggestion that Congress intended, by the child's insurance benefits provisions, to aid every child of a deceased individual. Instead, we concluded that the primary purpose of the insurance provisions was to aid dependent children. In the words of the Senate Report accompanying the 1965 Amendments, the insurance program was "intended to replace the support lost by a child when his father retires, dies, or becomes disabled." S.Rep.No. 404, 89th Cong., 1st Sess. (1965), 1965 *Cong. & Admin. News*, 1943, 2050.

Third, after determining that the primary purpose of the Act was to replace support lost by a child, we analyzed the statutory scheme of categories and presumptions and

concluded that it bore a rational and substantial relationship to the principal goal of the Act.

*The Supreme Court's Decision in Jimenez*

Eugenio and Alicia Jimenez were illegitimate children conceived and born after their father became disabled. From their birth, they lived with and were supported by their father and he acknowledged them as his children. Under Illinois law, however, they were not able to inherit from their father and were classified as illegitimates because their parents never married. Since they were born after the onset of their father's disability—the event insured against—he could not have acknowledged them, nor have been ordered by a court to make support payments, nor decreed by a court to be their father prior to his disability. *Jimenez* at 630-31. *See* § 416(h)(3)(B)(i). Similarly, it was impossible for the children to demonstrate that their disabled father lived with them or contributed to their support at the time his disability began. *See* 416(h)(3)(B)(ii). Dissimilarly, their older illegitimate sister was eligible to receive benefits because she was conceived prior to the father's disability and had lived with him and received his support at the requisite time. *Jimenez* at 630-31. Thus, while the older sister was eligible to receive benefits, the two after-born Jimenez children were unable to satisfy any of the alternate prerequisites to receive like treatment. *See* §§ 402(d)(3), 416(h)(2)(B), 416(h)(3)(B).

In *Jimenez*, the Supreme Court took a very narrow approach. In an opinion by Chief Justice Burger, the Court did not pose the issues in terms of discrimination between legitimates and illegitimates, rather, it analyzed the plaintiffs' challenge in terms of discrimination between certain subclasses of illegitimates. *Jimenez* at 635-36. By taking that approach, the Court had no reason to reach the question of whether illegitimacy is a "suspect classification," and, it expressly refused to reach that issue. *Id.* at 631-32.

The Supreme Court focused its analysis upon the fact that the Jimenez children were denied benefits solely because they were conceived and born after the onset of their father's disability. The Court began by determining



that "the primary purpose of the contested Social Security scheme is to provide suport for dependents of a disabled wage earner." *Jimenez* at 633-34. In identifying that goal, the Court rejected the argument that the Act's purpose was to aid only children who were dependent at the time of the disabling injury. *Id.* at 634-35. In the Court's view, Congress intended to aid all dependent children.

Having identified the primary purpose of the Act, the Court noted that after-born illegitimate children were for practical purposes divided into two subclasses. First, there were those who could recover without proving actual dependency prior to the disability, because they were presumed by the Act to be dependent at the requisite time. Second, there were those after-born illegitimates who were denied benefits, solely by reason of the timing of their births, because they could not possibly demonstrate dependency at the time their parent was disabled. Included within the latter class were children who, like Eugenio and Alicia Jimenez, were genuinely dependent upon their disabled parent.

The conclusive exclusion of such after-born children, the Court held, could not be justified solely on the basis of a claimed desire to avoid spurious claims. *Jimenez* at 636-37. The Court wrote,

> [T]he Act's definition of these two subclasses of illegitimates is "overinclusive" in that it benefits some children who are legitimated, or entitled to inherit, or illegitimated, solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is "under-inclusive" in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the law guaranteed by the due process provisions of the Fifth Amendment.

*Id.* at 637.

On remand, the Court directed that the Jimenez children were to be afforded an opportunity to demonstrate their eligibility by showing "that [they] are the children of the claimant, that they lived with the claimant all their lives, that he has formally acknowledged them to be his children, and that he has suppoted and cared for them since birth." *Jimenez* at 637-38.

*The Act*

*Norton*, like *Jimenez*, involves an attack upon the Social Security Act's scheme for providing benefits to children of persons insured under the Act. Although *Jimenez* involved disability benefits, while *Norton* involves survival benefits, the basic mechanics are essentially similar and involve either identical or parallel provisions of the act.

As they relate to *Norton*, we synthesize our understand- of the pertinent provisions of the Act. The term "child" means "the child or legally adopted child of an individual" as well as certain stepchildren and grandchildren. § 416 (e).[2] A child is entitled to benefits[3] if at the time of the event insured against the child was "dependent" upon the insured individual. § 402(d)(1). Legitimate and adopted children are "deemed dependent". § 402(d)(3). Children of marriages which are invalid for specified reasons, § 416 (h)(2)(B), and children who at specified times have been (a) acknowledged in writing by the insured individual, or (b) decreed by a court to be the child of an insured individual, or (c) the beneficiary of an order of court directing the insured individual to provide support are deemed to be the children of the insured individual, § 416(h)(3)(C)(i), and are also "deemed legitimate" and thereby "deemed dependent." § 402(d)(3).

As an alternate means of showing eligibility for benefits, a child who at the time of the event insured against could inherit personalty through intestate succession by the laws of the insured's state of domicile (with qualifications not pertinent) is deemed to be the child of the insured

[2] Further definition of "child" is provided by § 416(h)(2)-(3).

[3] Throughout our discussion of entitlement to benefits, we assume that the applicant child satisfies age, marital and filing requirements and has not been legally adopted by another.



individual from whom he could inherit. § 416(h)(2)(A). However, by the provisions of § 402(d)(3), such a child is not deemed legitimate and hence is not deemed dependent. Thus, as we read these provisions of the Act (which appears to be contrary in part to the Supreme Court's reading to which we will address ourselves later), a child seeking to show eligibility for benefits on the basis of the right to intestate succession must also show that he was living with or supported by the insured individual. § 402(d)(3).

Similarly, where a child cannot show eligibility under any of the foregoing provisions, eligibility may be shown by evidence satisfactory to the Secretary that the insured individual was the father of the child and lived with or contributed to the support of the child at the time of death. § 416(h)(3)(C)(ii). It is this provision that Norton attacks.

*The Effect of Jimenez Upon Our Prior Decision*

At the outset, two points concerning *Jimenez* may be easily stated. First, the Supreme Court did not use *Jimenez* as a vehicle for holding that illegitimacy is a "suspect classification" which requires "strict scrutiny" analysis. Rather, the Supreme Court expressly refused to reach that issue. *Jimenez* at 631-32. Thus, we see no reason to alter our prior opinion in that respect. *See Norton* v. *Weinberger*, 364 F. Supp. 1117, 1122 (D.Md. 1973).

Second, we do not read the Court's opinion in *Jimenez* to require any change in our previous conclusion that the primary purpose of the Social Security Act is to aid children who are actually dependent, as opposed to potentially dependent. Indeed, if anything, the Supreme Court appears to concur in our assessment of the statute's goal. In *Jimenez*, the Court stated in simple terms that "the primary purpose of the contested Social Security scheme is to provide support for dependents of a disabled wage earner." *Jimenez* at 634. If, as plaintiff suggests, the Supreme Court had meant that the primary purpose was to aid potential dependents or to aid all children who have not been adopted by third persons, we believe that it would have said so more directly. Also, the Court would not have remanded for proceedings to determine whether or not the disabled father

lived with or contributed to the support of the Jimenez children. In any event, the plaintiff's construction of congressional intent would make utterly inexplicable the complex provisions of the statutory scheme. Surely if Congress had intended to aid all children regardless of dependency it could have said so without devoting approximately 80 lines of the statute's text to defining who is deemed "dependent." *See* 42 U.S.C. §§ 402(d)(3), 416(h)(2)(B), 416(h)(3).

Turning from those specific points to the general constitutional analysis by the Court, we find nothing which would require us to change our prior decision. As we interpret the Court's opinion in *Jimenez*, the thrust of that opinion was that Eugenio and Alicia Jimenez, and the members of their class, could not be refused benefits without their first being afforded a realistic opportunity to prove that they were living with their parent or supported by him. In other words, the Court did not hold that Eugenio and Alicia were entitled to the same presumption of dependence as is afforded to certain other children. Instead, it merely ruled that, in light of the rest of the statutory scheme, after-born children in Eugenio and Alicia's class, may not be required to prove the impossible, i.e., dependence prior to their conception. *See Jimenez* at 636-38.

That general analysis by the Supreme Court in *Jimenez* has no application to *Norton* for two reasons. In the first place, unlike Eugenio and Alicia Jimenez, the plaintiff here is not now, and never has been, dependent upon his father. Thus, in contrast to the Jimenez children, Norton has not been arbitrarily denied benefits despite actual dependency. Norton was denied benefits because, in fact, he never was dependent and because Congress never intended to aid Norton's class of nondependents.

In the second place, it is manifest that the narrow form of discrimination which was dealt with in *Jimenez*—i.e., discrimination against certain after-born children—cannot possibly arise in the context of survivors benefits. It will be recalled that in *Jimenez*, the plaintiff children were in fact dependents at the time they applied for disability benefits, but they were denied benefits because, as they were after-conceived and after-born, they could not possibly prove that their father was living with them or contributing to their support at the time of the onset of his disability. By contrast, in the context of death benefits, no child is conclusively barred from recovering benefits solely because of the timing of his birth. Each child has a realistic opportunity to prove dependency at the requisite time for the obvious reason, that once deceased, the alleged parent is not going to father any more children. Thus, in the context of survivors benefits, only nondependents will fail to recover. Even the hypothetical child who is conceived prior to his father's death, but who is born afterwards, will recover if, at the time of his death, the father was living with the then-pregnant mother or was contributing to her support. *See Wagner* v. *Finch*, 413 F.2d 267 (5th Cir. 1964).[4] Accepting the rationale of the Fifth Circuit in *Wagner* v. *Finch*, *supra*, not only do we view Norton's complaint as different from that of the Jimenez children, we can perceive of no situation where a child of a deceased insured could ever pose the problem raised in *Jimenez*.



The statutory scheme for survivors benefits may be "overinclusive" in that some nondependents can recover benefits but it is not "underinclusive."[5] That is, although there will, of course, be *nondependent* children who cannot recover, there will be no *dependent* children who are unable to prove dependency at the requisite time. Consequently,

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[4] It is worth noting that in the Supreme Court's opinion in *Jimenez*, the Court wrote that Eugenio and Alicia's older sister, Magdalena, was entitled to benefits for her father's disability "because she had been *conceived* before Jimenez became disabled. . . ." Jimenez v. Weinberger, 417 U.S. 628, 631 (1974). (Emphasis added). Since we know from the district court opinion that, in fact, Magdalena had been *born* prior to her father's injury, the Supreme Court's choice of the word "conceived" appears to signify acceptance of the reasoning in Wagner v. Finch. *See* Jimenez v. Richardson, 353 F.2d 1356, 1358-59 (N.D.Ill. 1973) (per curiam).

[5] Norton, a nondependent child, cannot argue that the scheme for benefits denies equal protection merely because the statute's categories enable some nondependent children to get a free ride. The statute need not be perfectly drawn. It is enough that the statute's classifications are substantially and rationally related to the Act's permissible purpose, that it infringes on no suspect classifications, and that no conclusive presumptions operate to exclude arbitrarily those whom the statute is designed to aid.

the Supreme Court's narrow equal protection analysis in *Jimenez*—turning as it does upon the irrational exclusion of certain *after-born dependent* illegitimates from the class of dependent children generally—has no impact here nor upon any child seeking survivors benefits.

Finally, while we do not believe that the Supreme Court's constitutional analysis in *Jimenez* requires us to modify either the results or the analysis of our prior opinion, another aspect of the *Jimenez* opinion requires some additional comment. As indicated above, our prior decision in this case was premised upon our conclusion that the statutory scheme of classifications and presumptions was substantially and rationally related to the Act's purpose to aid dependent children of deceased wage earners. Accordingly, it is crucial that our understanding of the statute's classifications and presumptions was correct. With that in mind we must deal with a discrepancy between a narrow part of our interpretation of the Act and a part of the Supreme Court's description of the Act in *Jimenez*. The difference arises over whether or not an individual who has the status of child under the laws of intestate succession in the insured individual's state of domicile is automatically deemed dependent. While we thought not, *Jimenez* might suggest otherwise. *See* §§ 402(d)(1), 402(d)(3), 416(h)(2)(A). *Compare Jimenez* v. *Weinberger*, 417 U.S. 628, n.2 at 631, 635-36 (1974), *with Norton* v. *Weinberger*, 364 F. Supp. 1117, 1119 (D. Md. 1973).

Before discussing the discrepancy, we should note that, as we read its opinion, the Court's description of the portion of the Act in question was in the nature of general background. Therefore, it does not appear to have been necessary to the Court's conclusion that the Act unconstitutionally denied the after-born Jimenez children an effective opportunity to prove their dependency. While we proceed with caution and deference, we reiterate our belief that the part of the discussion in *Jimenez* which we have noted was not essential to the holding.

In analyzing this issue of statutory interpretation, we have reviewed again the language of the Act. Furthermore, we have searched the history of amendments to the Act in order to trace the development of insurance benefits for children,[6] and we have read pertinent portions of the legislative history. After this analysis, we have again returned to our earlier view that a child of an insured individual is not deemed "dependent" by the Act merely because he happens to be eligible to inherit personalty under the laws of intestate succession in the insured's state of domicile.[7] In our view, both the language of the Act and its history support the conclusion that state laws of intestate succession are invoked by § 416(h)(2)(A) merely to provide the Secretary with a method for determining who is a "child" of an insured individual and not for determining who is a "dependent" child.



Treatment of this issue of statutory meaning is best accomplished by quoting the relevant portions of the statute. Section 402(d)(1), the basic recovery section, provides in relevant part:

> § 402(d)(1)
>
> Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—
>
> . . .
>
> (C) was dependent upon such individual—
>
> . . .
>
> shall be entitled to a child's insurance benefit. . . .

---

[6] *See* Social Security Act Amendments of 1950, Ch. 809, §§ 202(d)(1), 202(d)(3), 216(h)(1), 64 Stat. 483-84, 511 (1950); Social Security Amendments of 1958, Pl. 85-840, § 205(d), 72 Stat. 1022 (1958); Social Security Amendments of 1960, Pl. 86-778, § 208(b)-(d), 74 Stat. 951 (1960); Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pl. 89-97, § 339(a)-(b), 79 Stat. 409 (1965).

[7] This is significant to the ultimate result in *Norton* because, if an individual were deemed dependent due to the unrelated circumstance that he is favorably treated under his state's intestacy laws, a significant question would be raised about the rational basis for the statutory scheme.

Thus, according to § 402(d)(1), a "child" must be "dependent" in order to be entitled to benefits.

In turn, §§ 416(e), 416(h)(2), and 416(h)(3) define who is a "child" for purposes of distributing these insurance benefits. Section 416(e) provides an initial definition of the term "child" which, in addition to natural and adopted children, reaches certain stepchildren and grandchildren. For our purposes, it is enough to quote the opening words of § 416(e): "The term 'child' means (1) the child or legally adopted child of an individual. . . ."

As § 416(e) provides little guidance, one must turn to §§ 416(h)(2) and (h)(3) for further explication of the term "child." Section 416(h)(2)(A) provides:

§ 416(h)(2)(A)

> In determining whether an applicant is the child . . . of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death. . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child . . . shall be deemed such.

Continuing, the Act states

§ 416(h)(2)(B)

> If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.



Finally, it adds

§ 416(h)(3)

> An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:
>
> . . .
>
> (B) in the case of an insured individual entitled to disability insurance benefits . . .
>
> (i) such insured individual—
>
> (I) has acknowledged in writing that the applicant is his son or daughter,
>
> (II) has been decreed by a court to be the father of the applicant, or
>
> (III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,
>
> and such acknowledgment, court decree, or court order was made before such insured individual's most recent period of disability began; or
>
> (ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of that applicant at the time such period of disability began;
>
> (C) in the case of a deceased individual—
>
> (i) such insured individual—
>
> (I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

It can be seen from the above-quoted sections that only a "dependent" child recovers, § 402(d)(1), and it can also be seen who meets the definition of "child," §§ 416(e), 416(h)(2)-(3). It is lastly necessary to determine who is deemed by the Act to be "*dependent.*" Section 402(d)(3) is the critical provision for defining "dependent":

§ 402(d)(3)

A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

*For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.* (Emphasis added).



Translation of the awkward series of negatives in the first sentence of § 402(d)(3) leads to a simpler basic formula—a child is deemed dependent (a) if his insured parent lived with him or contributed to his support or (b) if he is the legitimate or adopted child of the insured parent and he has not subsequently been adopted by a third person. Nothing in the first sentence exempts a child who can inherit under state intestacy laws from showing that the insured parent was living with him or contributing to his support.

Likewise, the second sentence of § 402(d)(3) does not deem to be legitimate (and, therefore, dependent) a child seeking to show eligibility under the intestate succession language of § 416(h)(2)(A). To the contrary, while the second sentence of § 402(d)(3)(A) expressly deems to be legitimate (and, therefore, dependent) children who qualify under §§ 416(h)(2)(B) and 416(h)(3), no reference is made to individuals who meet the definition of "child" under § 416(h)(2)(A). The omission of any reference to § 416(h)(2)(A) is conspicuous and, moreover, it is consistent with the evolution of these provisions of the Act.[8] Thus, an applicant for benefits who is a "child" under § 416(h)(2)(A) (i.e., one who has the status of a child under state intestacy laws), without more, still has to prove that the parent was living with or contributing to the support of such child.

On the basis of the above-quoted statutory language, we do not think it necessary to modify our earlier opinion with regard to our assessment of the rationality of the statute's classification scheme. Absent constitutional infirmity, we hold no warrant to eviscerate a congressionally enacted plan to provide benefits to children of individuals insured under the Act. We perceive no such infirmity.

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[8] *See* footnote 6, *supra.*

*Conclusion*

For the reasons stated above, we reaffirm our previous opinion and summary judgment will be entered separately in favor of the defendant.

/s/ Herbert F. Murray
Herbert F. Murray
United States District Judge

/s/ C. Stanley Blair
C. Stanley Blair
United States District Judge



WINTER, Circuit Judge, dissenting:

I respectfully dissent. In my view the decision in Jimenez v. Weinberger, 417 U.S. 628 (1974), requires us to alter our decision in Norton v. Weinberger, 364 F.S. 1117 (D. Md. 1973), vacated and remanded, 417 U.S. —— (1974) (*Norton I*), and to hold that the portion of the statute attacked denies equal protection of the laws and should be declared invalid. Since the Secretary has found that the deceased wage earner, Gregory B. Norton, Sr., was the father of the claimant, I would remand the case to the Secretary with directions to award the claimed survivor's benefit.

I.

I begin with an analysis of *Jimenez*, interspersed with comments on how it supersedes our prior holding. In *Jimenez*, the claimants, or applicants for disability benefits, were the illegitimate children of a disabled wage earner. They had been born after the onset of the wage earner's disability. The statutory scheme in *Jimenez* provided that when a wage earner suffers "disability," defined elsewhere in the Act, his legitimate children, under certain ages or under a disability themselves, are entitled to benefits if, *inter alia*, they were dependent on the disabled wage earner. § 202(d)(1) of the Act, 42 U.S.C. § 402(d)(1). Legitimate children are deemed dependent on the disabled wage earner irrespective of whether they live with him or he contributes to their support. § 202(d)(3) of the Act, 42 U.S.C. § 402(d)(3). By certain of the provisions of § 216, 42 U.S.C. § 416, which bear a marked similarity to the other provisions of § 216 which were considered in *Norton I*, certain illegitimate children can also recover benefits, i.e., illegitimate children entitled to inherit under the intestacy laws of the state (42 U.S.C. § 416(h)(2)(A)),[1]

[1] In *Jimenez*, it is stated flatly that "[u]nder the statute it is clear that illegitimate children born after the wage earner becomes disabled qualify for benefits if state law permits them to inherit from the wage earner, § 416(h)(2)(A)." 417 U.S. at 634. With protestations of due deference and respect, the majority opinion

children not entitled to inherit only because of some formal defect in their parents' marriage (42 U.S.C. § 416 (h) (2) (B) ), and illegitimate children if the wage earner's paternity has been established, prior to the beginning of disability, by formal acknowledgment, court order for support, or court decree of paternity (42 U.S.C. § 416 (h) (3) (B) (i). In the case of these classes of illegitimates as well, the statute deems them dependent on the disabled wage earner irrespective of whether they live with him or he contributes to their support. If a claimant

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undertakes to prove the statement inaccurate, as indeed it concedes that it must in ordr to preserve its thesis that Gregory B. Norton, Jr., has not been the subject of invidious discrimination. Majority opinion, n. 7.

I think the Supreme Court's statement accurate: § 402(d) (1) requires, *inter alia*, that a "child," to be entitled to a child's insurance benefit, "dependent" upon the insured person entitled to an old-age or disability insurance benefit. By § 402(d) (3), so far as pertinent, a child is deemed dependent upon his father unless his father was not living with or contributing to his support *and* the child is neither the legitimate nor adopted child of the father. Section 416(h) (2) (A), however, states that "[i]n determining whether an applicant is the child . . . of a fully or currently insured individual . . . ," the Secretary shall apply the law relating to the devolution of intestate property in which the insured individual is domiciled. It then states, "[a]pplicants who according to such law would have the same status . . . as a child . . . *shall be deemed such*." (Emphasis added.) The "child" that they are thus deemed to be is defined in § 416(e) to mean "the child or legally adopted child of an individual . . . ."

I read the statutes together to mean that an illegitimate who would inherit from his father under applicable state intestacy law is to be deemed a "child," and since he is deemed to be a "child," he is deemed dependent under § 402(d) (3). Even if he does not live with his father or is not supported by his father, the child does not fit into the exception in § 402(d) (3) for illegitimate or non-adopted children, because, by § 416(h) (2) (A), he is deemed to have the status of a legitimate child who may inherit. The fact that § 402 (d) (3) makes special provision for illegitimates of the categories defined in §§ 416(h) (2) (B) and 416(h) (3), but not § 416(h) (2) (A), is not significant, because, again, § 416(h) (2) (A), as I read it, says that illegitimates who can inherit under state intestacy law are deemed to have the status of legitimate children (thus, rendering any further special treatment unnecessary), while §§ 416(h) (2) (B) and 416(h) (3) do not.



fits none of these categories, the claimant is still entitled to benefits if the claimant can demonstrate paternity in fact *and* that the wage earner was living with or contributing to the support of the claimant *when the period of disability began* (42 U.S.C. § 416(h) (3) (B) (ii).

In *Jimenez*, the latter provisions were under attack—(a) that which required the birth of the child *before disability began*, and (b) that which imposed the condition of "living with" or "contributing to the support of" the claimant *disability of the wage-earner began*—even though paternity of the claimant had been established by evidence satisfactory to the Secretary. *Jimenez* held that the complete bar to after-born illegitimates denied equal protection of the law.[2] It gave strong and clear indications that imposition of either of the alternatives of "living with" or "contributing to the support of" was similarly invalid.

In arriving at its holding, the Court declined to prescribe the quantum of proof which would be required to sustain a discrimination among illegitimates in the context of social security benefits.[3] The Court adopted, as

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[2] In a suit of this nature between an individual and the federal government, the constitutional guarantee at issue is the fifth amendment and it, unlike the fourteenth amendment, contains no equal protection clause. However, it is established that the guarantee of equal protection of the laws is part of the concept of "due process" which the federal government must afford. Schneider v. Rusk, 377 U.S. 163, 168 (1964; Bolling v. Sharp, 347 U.S. 497, 499 (1954).

[3] The Supreme Court declined to declare illegitimacy a "suspect classification" requiring "strict scrutiny," 417 U.S. at 631-32, because it found that the discrimination in *Jimenez* was unconstitutional even under the somewhat looser and vaguer standard articulated in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-76 (1972): "the classification is justified by no legitimate state interest compelling or otherwise." There are, however, numerous indications in recent Supreme Court opinions that, in a proper case, a majority of the Court would find that illegitimacy was a suspect classification. See Frontiero v. Richardson, 411 U.S. 677, 686 (1973); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 60 (1973) (concurring opinion); Id. at 108 (dissenting opinion); Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (dissenting opinion). I, too, see no need to decide the issue, because I

basic, the premise that "the primary purpose of the contested Social Security scheme is to provide support for dependents of a disabled wage earner." [4] 417 U.S. at 634. Accordingly, it firmly and explicitly rejected the argument (on which *Norton I* is premised) that the "requisite economic dependency" within the purposes of the legislation is limited to actual support received prior to the event insured against, which, in *Jimenez*, meant prior to disability. 417 U.S. at 634.[5] No such showing, the Court

would conclude that the discrimination presented here fails under the *Weber* and *Jimenez* standards. I fear, however, that from the language of the majority opinion, n. 5, that the majority harbors notions that the "rationally related" test of Dandridge v. Williams, 397 U.S. 471 (1970), has some application to his case. I call attention that application of *Dandridge* was specifically rejected in *Jimenez*. 417 U.S. at 632-34.

[4] *Citing* the House-Senate Committee Conference Report on 1965 Amendments to the Social Security Act, 111 Cong. Rec. 18387 (July 27, 1965); and the Report of the Advisory Council on Social Security, The Status of the Social Security Program and Recommentdations for its Improvement, 67 (Washington, D.C., 1965). These documents speak of the Act as providing benefits if the insured father had an "obligation" or a "legal obligation" to support the child. In *Norton I*, the importance of this language in assessing the purposes of the Act was under-estimated. There, the Court said only that it is "descriptive of the Act's effect." 364 F.S. at 1127, n. 6.

[5] The language of the Court, apparently overlooked by the majority, could not be more specific:

> The Secretary maintains that the Act denies benefits to . . . [certain classes of illegitimates] because it is "likely" that these illegitimates, as a class, will not possess the requisite economic dependency on the wage earner which would entitle them to recovery under the Act . . . . Under this view the Act's purpose would be to replace only that support enjoyed prior to the onset of disability; . . . . *We do not read the statute as supporting that view of its purpose.* (Emphasis supplied.)

417 U.S. at 634.

The court's reliance in *Norton I* on this discredited view of the purpose of the Act was expressed at several places in its previous opinion. See, e.g.:

> The purpose of the Act, consistent with this dual concept, is to replace the support lost to a child when a wage earner dies.

364 F.S. at 1127.



pointed out, is required of either legitimate children or any other class of illegitimates.[6] Indeed, even under § 416(h)(3)(B)(ii), a claimant can establish entitlement to benefits without showing actual support if he can demonstrate paternity and the fact he was living with the wage earner prior to the period of disability. Furthermore, the Court's opinion rejected the Secretary's attempt to justify a requirement that illegitimates be born before the wage earner's death to entitle them to benefits on the basis that such claimants are less "likely to have the requisite economic dependency." [7] The Court went further and stated that "[e]ven if children might be rationally classified on the basis of whether they are dependent on their disabled parent," the statutory scheme was both "under-inclusive" and "over-inclusive"—"deeming dependent" in some instances those who are not, and excluding in others those who are.[8] Thus, the Court found

[6] It said:

> Indeed, as we have noted, those illegitimates statutorily deemed dependent are entitled to benefits regardless of whether they were living in, or had ever lived in, a dependent family setting with their disabled parent.

417 U.S. at 637.

[7] 417 U.S. at 634, 637. In *Norton I*, the Court stated that it was "rational" for the statutory scheme to assume that the classes of children "deemed dependent" were the recipients of actual support, and likewise rational to require applicants in plaintiffs' class to prove that fact. 364 F.S. at 1128. Deference was granted to the factual assumptions underlying the statutory scheme in reliance, *inter alia*, on Dandridge v. Williams, 397 U.S. 471, 485 (1970). In *Jimenez*, however, the Court held that the *Dandridge* reasoning was inapplicable because "the purpose of the statutory exclusion of some afterborn illegitimates . . . [was not] to achieve a necessary allocation of finite resources . . ." 417 U.S. at 634. In effect, a heavier and insupportable burden of justification was placed on the federal government than was placed on state governments in *Dandridge*, and the assumptions which were declared adequate to support the statutory classifications in *Norton I* were rejected by the Supreme Court in *Jimenez*. Compare *Norton I*, 364 F.S. at 1128, with *Jimenez*, 417 U.S. at 634.

[8] See note 6 supra. It is clear that the instant case presents the same problem of "over-inclusiveness" with regard to dependency. The government has argued, however, that the converse problem

that these after-born illegitimates were on the "same footing" with regard to the purpose of the statute (to provide for dependents of insured wage earners) as others whose claim to benefits was conceded. The difference in treatment was, therefore, a denial of equal protection.[9] The Court remanded the case to the district court to allow the Secretary to contest the assertions of paternity, support, and acknowledgment of claimants, issues which he had not contested in the district court because he had defended the denial of benefits on the statutory exclusion of illegitimates born after the wage earner's disability.

As I have noted, the statutory definitions of eligibility about which *Jimenez* and *Norton I* revolved—§ 416(h)(3)(B) and (C), respectively—are, except for the event insured against, identical. Once actual paternity was established, the only difference between the requirement that plaintiff in the instant case must satisfy and that which the Jimenez children were obliged to meet, if the statute is read literally, is that, in the instant case, the crucial date is the date of death, while in *Jimenez* the crucial date was the beginning of disability. Otherwise, the requirement that the wage earner must be living with, or contributing to the support of, the applicant, is the

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of under-inclusiveness is not presented because all claimants who were actually supported by the insured individual, or lived with him prior to his death would be eligible for benefits, including children conceived before, but born after, the death of the insured individual, Wagner v. Finch, 413 F.2d 267 (5 Cir. 1969). Even conceding the soundness of *Wagner's* holding that a child *en ventre sa mere* is living with the father when the father and the mother are living together, the government's argument cannot avoid the fact that many illegitimates who could prove neither actual dependency nor co-residence are concededly entitled to benefits. Of course it is not necessary that a statute be both under and over-inclusive for it to deny equal protection. In any event, the premise of the government's argument is unsound, because in *Jimenez* it was stated that the purposes of the Social Security Act as a whole do not depend on actual contribution. Thus, to exclude Norton's claim on the basis of the absence of that factor is simply without rational basis; and this is true whether or not all the children who received actual suport from deceased wage earners can recover or not.

[9] 417 U.S. at 637.



same in both cases. In both cases, an illegitimate claimant was denied benefits by the Secretary because he had received no "actual contribution" to his support prior to the statutory cut-off date, and in both the Secretary maintained that it was rational to demand proof of actual support in that sub-class of illegitimates because it was less likely to be present than in other classes. Since Norton is treated differently from other classes of claimants on the same grounds which the Supreme Court held were inadequate to justify the different treatment of the *Jimenez* applicants, I would conclude that Norton is being denied equal protection of the law as well.

## II.

I turn to two factors on which the majority relies to distinguish *Jimenez* from the instant case. The first is that *Jimenez* was concerned with children born (or conceived) *after* the wage earner's date of disability, while the instant case concerns a child born *before* the date of death. Thus, it was physically impossible for the wage earner to contribute to the support of the *Jimenez* claimants, or to live with them, prior to the beginning of his date of disability. By contrast in *Norton*, Norton, Sr. could have contributed to the support of Norton, Jr., but did not; and Norton, Sr. could have lived with Norton, Jr. had Norton, Sr. not been in military service and stationed overseas. As a result, the majority reasons that when viewed against the background of the majority's conviction—mistaken, I think—that the Act was designed to replace *only* loss of *actual* support, plaintiff has not been the subject of invidious discrimination.

The second is the Court's actual disposition of *Jimenez*, i.e., the remand to permit the claimants to establish, in an adversary proceeding, the truth of their allegations that they were the children of the disabled wage earner, that they lived with him all of their lives, that he acknowledged them as his children, and that he supported and cared for them since their birth. The significance of this disposition is that these are the very factors which would have made them eligible for benefits had they been present prior to the date of the wage earner's disability.

On the basis of both of these distinctions, the majority, in effect, infers that only the validity of the cut-off date, i.e., the date of the wage earner's death, was the point of decision in *Jimenez*: the Court was not invalidating the requirement that the wage earner live with or contribute to the support of the claimant as a condition of the claimant's eligibility—it was merely extending the time-span in which these conditions could be met. Thus, the *Norton I* result is unaffected, so the majority concludes, because Norton, Sr. could obviously not "live with" or "contribute to the support of" plaintiff after the former's death.

While I agree that *Jimenez* does not invalidate, *per se*, the alternate requirements of co-residence or actual support as conditions of eligibility, its reasoning, as well as its language, lead inevitably to that conclusion. It is true that the Court remanded the case to permit the claimants "to establish their claim to eligibility as 'children' of the claimant," 417 U.S. at 637-38, and this I read to require a showing of dependency. But the opinion seems to make clear that, under the Act, actual support is not a necessary aspect of the concept of dependency. As I have previously stated, the legislative history the Court cites for "the primary purpose" of the Act speaks of the "right to support," [10] and the opinion emphasizes in particular the inconsistency and injustice of requiring this particular sub-group of illegitimates to make a similar showing of any other class of applicants.[11] At another point, the Court seems to equate "dependency," "claim to support," and "right to eligibility." [12] Of course, a claim to support, or a right of support

[10] See n. 4, supra.

[11] 417 U.S. at 634, 636-37.

[12] The Court said:

> Their dilemma is compounded by the fact that the statute denies them any opportunity to prove dependency in order to establish their "claim" to support and hence, their eligibility.

417 U.S. at 635. While it is difficult to be sure of what this means, the phrase "claim to support" is pointless in the sentence if it is not the counterpart of both dependency and eligibility.



arises from the fact of paternity alone, and it is only the fact of paternity that other sub-classes of illegitimates are required to establish (by formal acknowledgment, court order, or court decree) in order to receive benefits. To me, it seems an inescapable conclusion from the premise that the Act was designed to provide a substitute for loss of the *right* to support, and not merely a substitute for loss of *actual* support, that proof of paternity alone, which gives rise to the right to support, is all that is needed to entitle this sub-class of illegitimates to benefits, that the purposes of the Act are fully served by proof of paternity alone and that a requirement of proof of more by this sub-class of illegitimate claimants results in invidious, unequal treatment. This I conceive to be the real thrust of *Jimenez* which the majority misses.[13]

I place no contrary significance on the terms of the remand in *Jimenez*. The remand merely referred inclusively to the allegations made by the claimants in support of their claim; it did not purport to establish a standard of eligibility. Although the claimants had alleged as facts all of the issues that the remand directed to be explored, none had been previously considered or litigated, because of the undisputed fact that the birth of two of the children had followed the beginning of the wage earner's disability by two and five years, respectively. It seems fairly obvious that since the provision of the statute making the fact of subsequent birth an automatic disqualification was in-

[13] Unlike the majority, I am not disturbed by the fact that this conclusion renders superfluous "approximately 80 lines of the statute's text . . . defining who is deemed 'dependent.'" It must be remembered that the Act, not simple in form at the time of its original enactment, has grown by accretion over a time span of approximately forty years. It is not surprising that in this period there have been refinements, extensions and modifications of congressional purpose and that there may be surplusage in congressional articulation. Unquestionably, there is other overlap between §§ 416(h)(2)(B) and 416(h)(3). What impresses the majority is more an argument for the need for restatement of the terms and provisions of the Act than a reason not to give effect to the Fifth Amendment.

validated, it was appropriate to order a full adversary evidentiary exploration of all of the allegations to determine what sort of case the claimants could prove and what statutory standards governing eligibility would be applicable. The Court did not say that all of the allegations must be proved for the claimants to recover; and I do not infer that the Court meant that all, or even some combinations, of the allegations must be proved by the *Jimenez* claimants to establish their entitlement to benefits. This is so because there can be no question that certain combinations—for example, formal acknowledgment of paternity and actual support—are plainly more than what is required under the Act once the limitation on the time of acknowledgment was removed. Moreover, although the remand directs attention to allegations beyond actual paternity, such facts as coresidence, acknowledgment and support, if proved, could be persuasive corroboration of actual paternity and therefore highly relevant to the determination of that basic issue. Surely the Secretary would be entitled to consider them in determining whether paternity was established "to [his] satisfaction." 42 U.S.C. § 416(h)(3)(B)(ii). The terms of the remand, thus, are not inconsistent with my conclusion that for the sub-class of illegitimates, of which plaintiff is a member, proof beyond that of paternity of the deceased wage earner may not be constitutionally required.

III.

For these reasons, I would enter a judgment declaring unconstitutional the portion of § 216(b)(3)(C)(ii) of the Act, 42 U.S.C. § 416(h)(3)(C)(ii), which requires proof that "such insured individual was living with or contributing to the support of the applicant at the time such insured individual died." I would also remand the case to the Secretary, with the direction that plaintiff's claimed benefits be allowed dating from the death of Gregory B. Norton, Sr., because I see no need for further evidentiary proceedings.

In proceedings prior to the action to review, the Secretary found that Norton, Sr. was the plaintiff's father. As the court's opinion in Norton v. Richardson,



352 F.S. 596 (D. Md. 1972), demonstrates, the evidence supporting this finding was not insubstantial. This is not a case where only the surviving mother claims that a deceased wage earner was the father of her child. By his act and deed, Norton, Sr. conceded paternity prior to his death, even to the point of taking positive, but legally ineffective, steps to provide a military allotment for the support of his son. On this record, unlike *Jimenez*, there is no need for further litigation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-271-B

GREGORY B. NORTON, JR., a minor, by his next friend, Marian B. Chiles, Individually and on behalf of all others similarly situated

*v.*

CASPAR W. WEINBERGER, Secretary, Department of Health, Education and Welfare, Individually and in his official capacity

ORDER

This matter having come before this court on remand for further consideration, after judgment for defendant was vacated by the Supreme Court of the United States, and this court having considered *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), this court's previous decision, the pleadings, briefs filed by the parties, and having heard the argument of counsel, and being fully advised of the premises, and this court having concluded that there is no disputed issue of material fact and that the defendant is entitled to judgment as a matter of law, it is hereby this 28th day of February, 1975, again

ORDERED that defendant's Motion for Summary Judgment be and is hereby granted and summary judgment be and is hereby entered in defendant's favor and the action is dismissed and it is

FURTHER ORDERED that plaintiff's Motion for Summary Judgment is denied.

/s/ Herbert F. Murray
Herbert F. Murray
United States District Judge

/s/ C. Stanley Blair
C. Stanley Blair
United States District Judge



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 72-271-B

GREGORY NORTON, JR., ETC., PLAINTIFF

*vs.*

CASPAR W. WEINBERGER, DEFENDANT

NOTICE OF APPEAL

Filed March 17, 1975

Notice is hereby given that Gregory Norton, Jr., by his next of friend, Marian B. Chiles, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered in this action on February 28, 1975, denying relief to plaintiff and granting defendant summary judgment.

This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ C. Christopher Brown
C. CHRISTOPHER BROWN
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341 North Calvert Street
Baltimore, Maryland 21202
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Attorney for Plaintiff

SUPREME COURT OF THE UNITED STATES

No. 74-6212

GREGORY NORTON, JR., ETC., APPELLANT

*v.*

CASPAR W. WEINBERGER,
Secretary of Health, Education and Welfare

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

June 30, 1975

Mr. Justice Douglas took no part in the consideration or decision of this motion.



SUPREME COURT OF THE UNITED STATES

No. 74-6212

GREGORY NORTON, JR., ETC., APPELLANT

*v.*

CASPAR W. WEINBERGER,
Secretary of Health, Education and Welfare

APPEAL from the United States District Court for the District of Maryland.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. See Weinberger v. Salfi, No. 74-214, n. 8 (June 26, 1975).

June 30, 1975

Mr. Justice Douglas took no part in the consideration or decision of this appeal.

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